

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC. : Civil Action No.
vs. : 3:09CV620
LAWSON SOFTWARE, INC. : January 4, 2011

COMPLETE TRANSCRIPT OF THE JURY TRIAL
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE, AND A JURY

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1 and Mr. Johnson. And it was a method. It was a
2 product and method for managing Fisher-Scientific
3 inventory such that they could try and fulfill their
4 inventory needs of their client by selling Fisher
5 products.

6 Now, the continuation is made here that the
7 Patent Office was unaware of that. I would suggest to
8 you that it is in the very patent directly in the
9 background of the invention. And it even says
10 underneath it that the disclosure is incorporated
11 herein by reference.

12 Now, you may also recall -- it was a lot of
13 information in that video, but you may also recall
14 that one of the things the narrator said was how you
15 disclose a patent was to put it in your application
16 and put it in your specification.

17 Here it is. And I've gone through and I've
18 counted. It's referenced no less, in its structure
19 and functionality, referenced no less than 52 times,
20 but at some point in time the suggestion is going to
21 be made by one of Lawson's experts is that they were
22 unaware of this patent and that this patent in
23 combination with some other alleged prior art would
24 invalidate or render the claims obvious.

25 One of those other pieces of prior art they

1 are going to reference was a document viewer program
2 that my inventors, the inventors you're going to hear
3 from, went out and identified and used as part of a
4 tool to build what became this electronic sourcing
5 procurement patent.

6 Again, if you can go to column 4 of the same
7 patent. Specifically, starting at line 5 through 9.
8 Just highlight that.

9 Here, in fact, it indicates that preferably,
10 but not necessarily, this Technical Viewer 2 search
11 program available from IBM is used as a search program
12 in this invention.

13 So the inventors actually told the Patent
14 Office in no uncertain terms that you could use
15 aspects of this RIMS system that the inventors
16 developed with aspects of this TV2 system, which they
17 actually went out and contracted with IBM as a
18 work-for-hire in order to have it included pursuant to
19 their specifications in the overall invention that
20 they ultimately decided on.

21 The suggestion now is that somehow this RIMS
22 system and TV2 system in combination or alone
23 invalidates the patents and the Patent Office could
24 not have been aware of it.

25 Well, the Patent Office, as the video

1 indicated this morning, is required to review this
2 specification, required to review this application,
3 and determine in the face of it whether or not it is
4 patentable.

5 So we certainly think it was no mystery to
6 the Patent Office that these inventors considered
7 these to be tools that would help them make a
8 commercial embodiment of their inventions.

9 In fact, they worked towards that goal. They
10 really made a prototype of this first invention. They
11 didn't have to. You don't really have to make a model
12 or a prototype. All you have to do is disclose to the
13 Patent Office what your invention is and you're
14 entitled to get a patent if it is new, useful and
15 nonobvious.

16 If I could just go to claim 26 of the '683
17 patent. This is a method claim that I wanted to
18 identify. It is always a claim that is being asserted
19 in this case. You may recall I indicated a method
20 claim is sort of a process or if you think about it,
21 the sort of steps of doing something. A good
22 comparison might be it's kind of a recipe for
23 achieving an outcome or a result.

24 If I had a method of making or baking an
25 apple pie, I might have the steps of taking the flour

1 And we're going to be talking about those
2 inventions and the applications that were filed at
3 that time on these early processes.

4 Now, the fact is there is going to be a lot
5 of discussion in the patent as to how they put
6 together the invention back in 1994, but that's not
7 important. That supported the fact that the Patent
8 Office recognized they had something new and useful
9 and not obvious. And then they claimed it.

10 Now, the fact is, as I said before, it's the
11 claims we're all going to have to focus on because
12 it's those claims that define what is, in fact, at
13 issue in this case and whether if indeed Lawson
14 infringes.

15 Now, have these patents been successful for
16 ePlus? They have been enormously successful. Since
17 they were acquired as part of this acquisition from a
18 company that Mr. Farber was at, at ProcureNet, in
19 2004, they have now received almost \$60 million in
20 royalty revenues associated for licensing these
21 patents to five separate companies including SAP, one
22 of the largest manufacturers of software in the world,
23 and a company known as Ariba.

24 Now, to be sure, ePlus has had to enforce its
25 rights sometimes in court in order to have others

1 it has the capability of doing it, but our customers
2 just don't want to do that a lot. It's like saying, I
3 could sell a car with infringing windshield wipers,
4 but I just never turn them on. So that's not an
5 infringement. Well, if the product is sold with the
6 capability of doing it, that is infringement.

7 So, Your Honor, with that I have concluded my
8 issues with respect to infringement. As I understand,
9 I would like to address some of the issues on
10 invalidity after Mr. McDonald has an opportunity to
11 speak to the jury.

12 Is that what I understood Your Honor to be
13 suggesting?

14 THE COURT: I want to know if he wants to
15 agree to that?

16 MR. McDONALD: He already went into
17 invalidity. He should finish his opening statement.

18 THE COURT: Finish your statement. I'm not
19 sure that's how we're going to try the case, but we're
20 going to finish it.

21 MR. ROBERTSON: Let's talk a little bit about
22 invalidity because the case now is raised with respect
23 to what are going to be called six prior art
24 references. Four of those six were considered by the
25 Patent Office. Two of them I already referenced to

1 you being that RIMS system and the TV2 system.

2 They represent either alone or in isolation
3 or in combination, those references invalidate all 12
4 of the patent claims that are at issue.

5 We believe the evidence will show exactly the
6 opposite, that the Patent Office was fully aware of it
7 and that the RIMS system is radically different from
8 what the patented system is. And that can be
9 explained by at least two of the inventors who were
10 responsible for and were the named inventors on the
11 RIMS system.

12 There are two other systems that are going to
13 be identified. One is called the J-CONN, which was
14 essentially a parts ordering inventory system in our
15 view, and our expert will address how it doesn't have
16 all the elements of the claims.

17 Indeed, Lawson admits that it doesn't
18 anticipate any of the 12 claims that are at issue
19 here. In other words, it doesn't have all of the
20 elements.

21 Another system that they'll be raising is
22 called P.O. Writer, which we really think was simply
23 nothing more than a sort of electronic form filler for
24 purchase orders. And Lawson even admits that it
25 doesn't anticipate or have every element of nine out

1 of the 12 claims here.

2 So what they need to do is then try and put
3 together what's known as an obviousness case. To say,
4 Well, a person of ordinary skill in the art back in
5 1994 would have somehow known to take the J-CONN
6 system and combine it with the P.O. system and take
7 the J-CONN system and combine it with some other
8 patent they are going to point you to, and then really
9 in hindsight make up the invention that was conceived
10 of and reduced to practice back in 1994.

11 We think the analysis done by their expert on
12 that is going to be significantly lacking. And,
13 indeed, it's interesting to note that even their
14 expert concedes that he doesn't even agree with
15 Lawson's lawyers on how the invalidity should be put
16 together. So I gather that reasonable minds in that
17 respect can differ.

18 So I think, Your Honor, with that I would say
19 thank you. I think the bottom line is that the
20 evidence will show that Lawson infringes and that the
21 patents are invalid, and we would respectfully ask
22 that you return a verdict of infringement at the end
23 of the evidence. I thank you for your attention.

24 THE COURT: We'll take our lunch recess for
25 45 minutes. It will probably be closer to an hour by

1 the time I talk to the lawyers.

2 All right. You can take your pads with you
3 if you would. Put your names on them.

4 (The jury is out.)

5 THE COURT: Anything we need to go over?

6 MR. McDONALD: Your Honor, in response to
7 your question I would like to do my opening about
8 validity and infringement.

9 THE COURT: Well, if you want to. I
10 understand the need to cover these things in opening
11 statement, but there was so little said about
12 infringement I got the idea that basically it was a
13 closing argument on invalidity.

14 So you can do it, but I'm wondering whether
15 it's not better to just try the case on the issues of
16 invalidity, let the jury return a verdict -- I mean of
17 infringement. Let the jury return a verdict on
18 infringement or not. And then we'll try the
19 invalidity case. After hearing the statements and the
20 way you-all are proceeding. Why isn't that the best
21 way to proceed now, Mr. Robertson?

22 I don't think you have it within you to
23 fragment the case the way it's supposed to be. You
24 had nothing to say about invalidity in your opening
25 part of the case. None. It's not your business.

1 It's not what you're hear to prove. And I don't want
2 to hear anything about it.

3 And you-all are getting things so commingled,
4 you're going to get the jury confused. I now after
5 listening to the opening statements have come to the
6 conclusion that's really how we ought to try the case
7 and just let the jury have the instructions and
8 verdict on infringement and then try the invalidity if
9 they return an infringement finding. If they don't,
10 the case is over.

11 I think you-all ought to think about that.
12 It seems to me as if I've told you before how the case
13 needs to be tried, that you don't anticipate or put on
14 all your evidence in anticipation or *in apprehendo* and
15 then come back and try to do it again. We're not
16 going to do it that way.

17 I thought I told you that from the very
18 beginning of the case. It looks to me like maybe
19 you're going to have to think about that at the lunch
20 hour.

21 MR. McDONALD: Your Honor, during the opening
22 statements of Mr. Roberson, he made statements saying
23 that the RIMS prior art was considered by the Patent
24 Office. That's directly contrary to a statement by
25 the Patent Office on the reexams of all three patents.

1 THE COURT: Look, if it was in the patent, if
2 was in the patent, they're bound to have considered
3 it.

4 MR. McDONALD: It was not in the information
5 disclosure statements. It was not identified as to
6 references cited --

7 THE COURT: How did it get in the
8 specification?

9 MR. McDONALD: They wrote it in there. What
10 he was talking about, he showed them the issued
11 patent, but as filed, it didn't show the patent number
12 on it.

13 THE COURT: Well, somehow in the process it
14 got in there, and I don't care what they found there.
15 Somehow the Patent Office issued a document that had
16 actually in it the RIMS system.

17 You tell me they didn't consider it even
18 though they put it in there?

19 MR. McDONALD: There's a new issue raised by
20 the reexams because of the RIMS prior art because they
21 found, the Patent Office found, in the re-exams that
22 it was not --

23 THE COURT: We're not going to deal with the
24 reexams and maybe this is an example where the Patent
25 Office is all wet. When the Patent Office puts in the

1 specification something that says you have a patent on
2 this, to let them then come back in here and say,
3 Well, we didn't consider it is almost farcical.

4 MR. McDONALD: There's a procedure for
5 disclosing prior art. Very easy process. Put it on
6 your disclosure statement. They didn't do it. That's
7 why it didn't show up on the cover page of the patent
8 under the references cited. TV/2 is in there too, but
9 they also disclose the prior art as references cited.

10 THE COURT: That looks to me like an excuse
11 for doing a sloppy job at the Patent Office. I'm not
12 dealing with the reexamination. I'll have to deal
13 with the other issue later.

14 All right. We'll be in recess. Since I've
15 kept you this long, we'll take an hour from the time I
16 let the jury go.

17
18
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Marion - Cross

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1 A That's correct.

2 Q In fact, the procurement division of Mr. Farber, that's
3 less than two percent of the company, isn't it?

4 A That sounds about accurate, yes.

5 MR. McDONALD: I have no further questions. Thank
6 you.

7

8 REDIRECT EXAMINATION

9 BY MR. ROBERTSON:

10 Q Just so I'm clear, Ms. Marion, this document that was
11 shown to you called strategic competitors analysis has nothing
12 at all to do with this electronic procurement software we've
13 been discussing?

14 A No, it does not.

15 Q Doesn't have anything to do with that part of the
16 business; is that right?

17 A It does not, sir. Who prepared it has nothing to do with
18 the procurement business.

19 Q When I asked you about the almost \$60 million in royalty
20 revenues that were enjoyed by licensing these patents, they
21 weren't --

22 MR. McDONALD: Your Honor, we didn't get into that on
23 direct, because I objected and you sustained.

24 THE COURT: Correct.

25 MR. ROBERTSON: He's opened up the issue about

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1 inventor along with Mr. Johnson. Do you recall that?

2 A Yes, I do.

3 Q I'd like to move on now to this electronic
4 sourcing system and method, the inventions that are
5 subject of the patents that are at issue here if we
6 could. All right?

7 A Okay.

8 Q Tab 1 in your witness notebook, I believe it's
9 Plaintiff's Exhibit No. 1, if you could go to column
10 1.

11 THE COURT: That's also in your small book
12 there if you need to.

13 Q And tab 2. Thank you.

14 So we're on column 1 now of the '683 patent,
15 Exhibit No. 1. Now, suggestion was made yesterday
16 that the Patent Office was unaware of the RIMS patent.
17 Did you disclose the RIMS patent to the Patent Office?

18 A Yes, I believe so.

19 MR. McDONALD: Objection, Your Honor. This
20 is going to the validity issue. Again, I thought we
21 were going to stick with infringement.

22 THE COURT: Isn't it?

23 MR. ROBERTSON: No, Your Honor.

24 THE COURT: Why does it have to do with
25 infringement?

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1 MR. ROBERTSON: Because there's going to be
2 discussion as to scope of the claims and how they are
3 to be applied to the accused product. And one of the
4 embodiments that was raised was this RIMS embodiment,
5 and I want to go and discuss in the claims whether
6 they are limited to that RIMS embodiment or whether
7 they are broader than that RIMS embodiment. It was
8 raised during the opening statement as to whether RIMS
9 was the essential component of the claims. So how the
10 claims are to be applied to the accused system depends
11 on how they are to be understood in the specification
12 of the patent itself.

13 THE COURT: It's in the patent, isn't it?

14 MR. ROBERTSON: Well, the -- I mean --

15 THE COURT: What kind of testimony is this?
16 It sounds to me like expert testimony.

17 MR. ROBERTSON: I just want to ask the
18 witness --

19 THE COURT: Look, what you want to ask the
20 witness is one thing. He's objected to the question
21 as invalidity. Is it or not?

22 MR. ROBERTSON: It's not, Your Honor.

23 THE COURT: You heard his argument, Mr.
24 McDonald. What do you say?

25 MR. McDONALD: I think he can talk to him

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1 about RIMS and the difference between RIMS and the
2 claims. That's fine. But I don't see what the
3 disclosures to the Patent Office at this point in the
4 trial, why we need to go into that.

5 MR. ROBERTSON: Let me ask it this way.

6 Q Was RIMS one of the embodiments that we're
7 disclosed in the patent for requisition and purchasing
8 module?

9 A Yes.

10 Q Do you know whether or not in your review of the
11 specification --

12 THE COURT: Wait a minute. Are you saying
13 was RIMS disclosed as an embodiment of the patent, of
14 the invention? Is that what your question was?

15 MR. ROBERTSON: No. I'm saying, Your
16 Honor --

17 THE COURT: If that's the case, then this
18 case -- we don't have a case, do we?

19 MR. ROBERTSON: No, Your Honor.

20 THE COURT: Then ask the question a different
21 way.

22 BY MR. ROBERTSON:

23 Q Was RIMS identified as one of a requisition
24 purchasing system that could be used as part of an
25 embodiment of the invention that you Mr. Kinross,

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1 Mr. Johnson, and Mr. Melly invented?

2 A Yes.

3 Q Did you identify in the patent whether or not
4 there were some problems associated with the RIMS
5 requisition and purchasing system for use in the
6 patent?

7 A Yes, we did identify several.

8 Q Let me direct you, if I can, to the bottom of
9 column 1. First, before I do that, at the top of
10 column 1, starting at about line 10 through line 16,
11 could we just -- is this the RIMS patent that we have
12 identified that you're one of the inventors, the '989?

13 A That wording is pulled out of '683, yes. '989 is
14 the RIMS patent.

15 Q So it's saying here that there were a number of
16 known requisition and purchasing systems, is that
17 right, including this Fisher RIMS system?

18 A Yes.

19 Q Now, if you will look down at the bottom of column
20 1 starting at about line 60, going over to column 2
21 around line 2, what are you representing there to the
22 Patent Office with respect to these requisition and
23 purchasing systems which include the Fisher RIMS
24 system?

25 A It identifies that there's some shortcomings to

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1 the requisition purchasing systems, including RIMS,
2 for the ability to have a catalog be able to search
3 multiple catalogs and then move that information into
4 the requisition purchasing system.

5 Q Are there any other problems that have been
6 identified with these requisition and purchasing
7 systems including RIMS in this section of the patent?

8 A Yes. As you look down column 2, maybe line 10,
9 computer systems for searching vendor catalogs are
10 limited, and only one such vendor catalog is
11 accessible to the user at any given time. They were
12 also limited in they can only create a particular
13 vendor catalog database.

14 Q You have to go a little slower, Mr. Momyer.

15 A Sorry. They were also limited in that they can
16 only create an order within the particular vendor
17 catalog database. They cannot source items to be
18 requisitioned from a database containing multiple
19 catalogs or interact with the requisition purchasing
20 system or create a purchase order or orders including
21 the items located from the sourcing operation.

22 Q Now, you discussed this RIMS system throughout out
23 the patent. Let me ask you to go to column 4 at the
24 top. Did you indicate to the Patent Office that this
25 RIMS system was necessary to your electronic sourcing

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1 patent?

2 A I think it's preferably but not necessarily in the
3 Fisher RIMS system is what it says in column 4.

4 Q There's also a discussion here about a Technical
5 Viewer 2 Search Program called TV/2. Do you see that
6 as well?

7 A Yes.

8 Q Are you familiar with that program?

9 A Yes.

10 Q It indicates in your patent that that was a
11 program that was available from IBM?

12 A That's correct.

13 Q Does it indicate that that program was necessary
14 to your invention?

15 A The wording says preferably but not necessarily in
16 the Technical Viewer 2 Search Program.

17 Q Let me direct you if I could to column 6 of the
18 patent beginning at about line 34 going down to about
19 line 39.

20 A Column 6?

21 Q Yes, sir.

22 A Line 44?

23 Q 34.

24 A 34. Okay.

25 Q You state here the following description

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1 illustrates the use of the Fisher RIMS as a
2 requisition purchasing system and the TV/2 search
3 program as a search program; however, it will be
4 understood that the present invention is not limited
5 to such system or program. Do you see that?

6 A Yes, I do.

7 Q Is that consistent with your understanding as to
8 what you disclosed in your patent?

9 A Yes.

10 Q Well, so you used the Fisher RIMS system to
11 describe certain features of functionality in your
12 patent. Was it necessary to your patent to use the
13 Fisher RIMS system?

14 A No, it was not.

15 Q You also use the TV/2 search program to describe
16 certain capabilities and functionalities in your
17 patent. Was it necessary for your patent, for your
18 electronic sourcing patent?

19 A No, it was not.

20 Q Can I just -- I put a juror notebook over on your
21 witness stand that the jury has, and in it starting at
22 tab 2 are the three patents that are at issue here.
23 And you'll see there are yellow tabs where the claims
24 appear. And I'd like you to just briefly take a
25 moment to go through any of those claims and tell us

Weaver - Direct

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1 the end user never turns it on?

2 A Yes.

3 Q Now, I've asked you a lot about these documents, and I
4 don't want to repeat them all, but the types of documents we've
5 been talking about, technical manuals and guides and these
6 RFPs, are these the type of documents that an expert in your
7 field who is going to be offering opinions on the capabilities
8 and functionality of computer software would reasonably rely on
9 in forming opinions about the infringement issues that are at
10 issue in this case?

11 A Yes, they are.

12 Q And have you, in the past, in these patents and other
13 patents, relied on these kind of documents in rendering your
14 opinions?

15 A I have.

16 Q Did you have the opportunity to review the expert reports
17 of Lawson's technical witnesses?

18 A Yes, I did.

19 Q Did any of those materials assist you in formulating
20 opinions that you will be rendering in this matter?

21 A Yes, they did.

22 Q Just generally, you understand the patents to be directed
23 to the subject matter of electronic sourcing and procurement?

24 A I do.

25 Q Have you had any personal experience in your job to engage

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UNITED STATES DISTRICT COURT

WEAVER - DIRECT

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1 would include suppliers, manufacturers, and
2 distributors.

3 Q Did you apply those terms when you conducted your
4 infringement analysis?

5 A Yes, I did.

6 Q Just what's your understanding at a high level
7 overview of what these patents are about, sir?

8 A The invention in the patents is to bring together
9 electronic technology so that we can have electronic
10 catalogs. They can be kept in a database. They can
11 be searched. Items could be found. Items could be
12 selected. Items could be put on a requisition, and
13 then the requisition could be turned into a purchase
14 order. And then depending on which claims we're
15 talking about, there's also the capability of checking
16 on whether an item is available in inventory and
17 taking one item and finding generally similar items
18 that you might want to substitute.

19 Q The title in the patent says, "Electronic Sourcing
20 System and Method." So what's your understanding of
21 the term "method" in the title of the patent?

22 A A method is a process.

23 Q What types of processes are we talking about in
24 this electronic sourcing system?

25 A So these are steps that a computer would follow.

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CHRISTOPHERSON - DIRECT

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1 he's just testifying in his capacity as an employee
2 for Lawson. So I don't think there was a requirement
3 for him to do an expert report.

4 THE COURT: If he's giving expert testimony,
5 if he's testifying as an expert for Lawson, he has to
6 give a report. I don't care whether he's an employee
7 or not.

8 MS. STOLL-DeBELL: He wasn't professionally
9 retained to give expert testimony.

10 THE COURT: You can't have an employee
11 professionally retained or otherwise give expert
12 testimony without a report.

13 MS. STOLL-DeBELL: Okay. I don't think it
14 matters because I don't think I'm asking him for
15 expert testimony. I want to -- I think it goes to the
16 intent --

17 THE COURT: You're just asking him whether he
18 thought Lawson did something different.

19 MS. STOLL-DeBELL: Yes, were they different.

20 THE COURT: Okay. Why don't you ask him
21 that?

22 BY MS. STOLL-DeBELL:

23 Q Did you think Lawson was doing something different
24 than the patents?

25 A Yes.

CHRISTOPHERSON - DIRECT

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1 Q Did you have a meeting with your team members
2 regarding the lawsuit?

3 A Yes.

4 Q Did they agree with you?

5 MR. ROBERTSON: Objection, Your Honor.

6 MS. STOLL-DeBELL: Let me ask a better
7 question.

8 THE COURT: Yes. She's going to ask a
9 different question.

10 BY MS. STOLL-DeBELL:

11 Q Did they agree with you that what Lawson was doing
12 was different than the patents?

13 MR. ROBERTSON: Objection, Your Honor. It
14 still calls for a legal conclusion, and it's
15 inappropriate expert testimony, and it's hearsay.

16 THE COURT: It's sustained as hearsay. It's
17 offered for the truth of the matter. So it doesn't
18 have any nonhearsay use.

19 BY MS. STOLL-DeBELL:

20 Q Was it your recommendation that Lawson not make
21 any changes --

22 THE COURT: What did you do after this? Ask
23 him. Let him testify.

24 Q What did you do after you read the patents?

25 A I'll provided recommendation that in my belief, my

CHRISTOPHERSON - DIRECT

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1 reading, we weren't doing that patent, first, and that
2 they didn't need to do any changes with the software
3 that was currently available.

4 MS. STOLL-DeBELL: I have no further
5 questions right now, Your Honor.

6 THE COURT: All right. Cross-examination.
7

8 CROSS-EXAMINATION

9 BY MR. ROBERTSON:

10 Q Let's start with that last topic first if we
11 could, Mr. Christopherson.

12 A Sure.

13 Q You did something else, didn't you, sir, besides
14 making the recommendation that no changes would be
15 made to the software?

16 A I'm not sure what you're referring to, sir.

17 Q Lawson went out and sought a legal opinion with
18 respect to these patents, didn't they, sir?

19 MS. STOLL-DeBELL: Objection, Your Honor. I
20 don't think it's appropriate to get into whether we
21 got an opinion or not. It's not relevant.

22 MR. ROBERTSON: It goes to the whole intent
23 issue, Your Honor, under the *Broadcomm v. Qualcomm*
24 case.

25 MS. STOLL-DeBELL: Your Honor, it goes to

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1 jury instructions that you're going to give, and I
2 think there's a disputed issue of law here on that
3 point. And I think the law is clear that we don't
4 have to get into it. It's just not relevant. We
5 shouldn't be getting into this. We have no duty to go
6 get an opinion. And so he shouldn't be getting into
7 this. It's prejudicial.

8 MR. ROBERTSON: The door was opened, Your
9 Honor, when they asked him what he did and steps he
10 took. And under the *Broadcom v. Qualcomm* case, if he
11 sought a legal opinion and then failed to disclose it,
12 that can go to the intent issue, and that's what I
13 want to ask him.

14 MS. STOLL-DeBELL: I was going to say I asked
15 him what he thought and what he did. I did not ask
16 him about any communications he had with any of
17 Lawson's attorneys outside or inside. I was merely
18 asking him what he personally thought and what he did.
19 So it's outside the scope as well.

20 THE COURT: Well, I don't think it is. I
21 think it's fair cross-examination.

22 Just answer the question yes or no because
23 I'm going to have to take it question by question. I
24 think what he did, whether he got a legal opinion, can
25 be considered depending on what the answer is. If his

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1 answer was no, he didn't, then I'll tell the jury one
2 thing. If the answer is yes, then I have to tell the
3 jury something else.

4 So the objection is overruled. You may
5 answer the question whether you sought a legal opinion
6 respecting whether your products infringed.

7 MR. ROBERTSON: Well, actually, I don't know
8 what the legal opinion says and whether it was
9 infringement, Your Honor, or was some other basis.

10 THE COURT: All right. You can ask your own
11 question. Did you seek a legal opinion of any kind,
12 whatever?

13 MR. ROBERTSON: Yes.

14 BY MR. ROBERTSON:

15 Q I don't want to know the content of that because
16 that was privileged; however, the fact is you didn't
17 turn it over in discovery to ePlus; isn't that right?

18 MS. STOLL-DeBELL: Objection, Your Honor.
19 That's really not relevant and it's outside the scope
20 of my direct examination and --

21 THE COURT: I'm waiting to hear what you have
22 to say. I thought you were conferring with Mr.
23 McDonald about what you were going to say. And so I
24 just held everything in abeyance until you finished
25 your remarks.

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1 whether it's on infringement or validity or both, but
2 it hasn't been turned over. And the case stands
3 generally for the proposition that opinions of
4 counsel, whether it's for infringement or whether it's
5 for validity or both, and whether or not those
6 opinions have been turned over can be considered as
7 part of the intent prong of the indirect infringement.

8 THE COURT: Where does it say that?

9 MR. STRAPP: Well, Your Honor, Qualcomm's
10 position was that it couldn't. The fact they hadn't
11 obtained an infringement opinion and that they had
12 obtained a validity opinion, but not turned it over,
13 couldn't be considered, and, therefore, the jury
14 instruction that had been submitted was incorrect.

15 THE COURT: But that was on the issue of
16 willfulness.

17 MR. STRAPP: Well, Your Honor, specifically.

18 THE COURT: That's precisely what the
19 instruction says on page 12.

20 MR. STRAPP: Your Honor, actually the
21 instruction went both to -- there was an instruction
22 on willfulness, and an instruction -- the specific
23 instruction that's at issue in this case was an
24 instruction on indirect infringement.

25 THE COURT: Where is it?

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1 MR. STRAPP: Your Honor, it's at the bottom
2 of page 13 on the left column.

3 THE COURT: Because opinion of counsel
4 evidence along with other factors may reflect whether
5 the accused infringer knew or should have known that
6 its actions would cause another to directly infringe,
7 we hold that such evidence remains relevant to the
8 second prong of the intent analysis.

9 MR. STRAPP: Yes, Your Honor.

10 THE COURT: Well, what evidence were they
11 talking about? What the opinion was or the failure
12 provide it?

13 MR. STRAPP: Your Honor, it was --

14 THE COURT: Or failure to get it? Excuse me.

15 MR. STRAPP: It was the failure to obtain an
16 non-infringement opinion in that case.

17 THE COURT: Okay.

18 MS. STOLL-DeBELL: Your Honor --

19 THE COURT: Just a minute.

20 MS. STOLL-DeBELL: Okay.

21 THE COURT: Okay.

22 MS. STOLL-DeBELL: Okay, Your Honor. If
23 we're looking at the totality of the circumstances and
24 this issue of whether we chose to waive privilege or
25 not comes into evidence, I think it is highly relevant

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1 to look at the evidence of the reexams as well.

2 THE COURT: Wait a minute. Just quit
3 bringing that reexam up.

4 MS. STOLL-DeBELL: Your Honor --

5 THE COURT: I don't want to hear about it
6 anymore right now. I'm dealing with your objection to
7 the allowing the opinion in or the failure to disclose
8 the opinion in. That's what I want to hear right now.
9 I'll deal with the other at some other time if it's
10 pertinent, but I certainly don't want to hear it as
11 part of this.

12 MS. STOLL-DeBELL: Okay. Going to this
13 issue, we did not fail to get opinions. We got them.
14 We made a choice, as is our right, to not waive the
15 privilege on them and not disclose them to ePlus'
16 counsel.

17 I think this case is dealing with failure get
18 an opinion. Mr. Strapp said that as well. So that's
19 the first issue.

20 The second is I think it's very prejudicial
21 because we have no duty to go get an opinion. The
22 case law says that. The case is cited in here. So by
23 talking about whether we got an opinion or not implies
24 to the jury that we had a duty and an obligation to
25 get one, which we did not.

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF VIRGINIA
3 RICHMOND DIVISION

11 COMPLETE TRANSCRIPT OF THE JURY TRIAL
12 BEFORE THE HONORABLE ROBERT E. PAYNE
13 UNITED STATES DISTRICT JUDGE, AND A JURY

24 Peppy Peterson, RPR
Official Court Reporter
25 United States District Court

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1 THE COURT: Even though there's a specific
2 case law that says that you can't draw --

3 MR. STRAPP: Your Honor, all the cases
4 that --

5 THE COURT: -- a negative inference that you
6 seek.

7 MR. STRAPP: Your Honor, *Knorr-Bremse* is the
8 case on the adverse inference. That's strictly
9 limited to willfulness. That was the Federal
10 Circuit's only question addressing the other district
11 court case cited by Lawson in its papers, which is
12 also a willfulness case, and, in fact, distinguishes
13 itself from *Broadcom* because it's willfulness.

14 THE COURT: That's the same argument as
15 you've made before. I'm going on with life. Let's
16 go.

17 Anything else?

18 MS. STOLL-DeBELL: The only thing I wanted to
19 point out is I think you've got two proposed
20 corrective instructions here, Your Honor. We think
21 ours is better. It's shorter. It's simpler and it
22 just gets to the issues that need to be addressed and
23 doesn't get into Mr. Christopher's opinion, which is a
24 completely separate issue. He's not an attorney. He
25 didn't waive privilege to give it. He just said what

1 he thought. They opened the door when they asked him
2 what Lawson did after they learned of the patents.

3 So the questions I asked about that were
4 simply responding to the questions that ePlus asked
5 him.

6 THE COURT: All right. Thank you.

7 MS. STOLL-DeBELL: Thank you.

8 THE COURT: In my judgment, there's a fairly
9 substantial disconnect in the basic law applying to
10 opinions of counsel and how they can be used and how
11 they can't be used, but the law, as it exists, is, I
12 think, fairly clear on some points.

13 And the question is whether if an accused
14 infringer obtains an opinion of counsel and doesn't
15 waive the attorney-client privilege, the plaintiff or
16 patentee can use that fact as part of the totality of
17 circumstances that may be considered in adjudicating
18 by the finder of fact of the intent component of
19 induced infringement.

20 There is no case on the point that either
21 parted has cited. The case of *Broadcom* deals with the
22 failure to obtain an opinion of counsel. The
23 Knorr-Bremse decision provides that no adverse
24 inference shall arise from invocation of the
25 attorney-client and/or work product privilege.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC. : Civil Action No.
vs. : 3:09CV620
LAWSON SOFTWARE, INC. : January 18, 2011

COMPLETE TRANSCRIPT OF THE JURY TRIAL
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE, AND A JURY

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United States District Court

Momyer - Direct

2093

1 by disclosed?

2 MR. McDONALD: Let me clarify it.

3 Q Mr. Momyer, did you through a process of gathering
4 information --

5 A Yes, I did.

6 Q Let me finish the question because that's a pretty rough
7 question right there. -- information in connection with your
8 patent application in this case?

9 A Yes.

10 Q And did that include some prior Fisher product materials?

11 A Yes.

12 Q So StockPro was one of them; right?

13 A StockPro was one.

14 Q And go to the second column. There's one called
15 PurchasePro; do you see that?

16 A Yes.

17 Q Did you gather up literature about PurchasePro for
18 disclosure to the Patent Office?

19 A One of the inventors may have. I don't recall myself
20 pulling that together.

21 THE COURT: Excuse me a minute. When he asks him a
22 question about a particular part, it would be better if you
23 would zero in on the part of the text, if you can blow it up,
24 because it's hard to read those things.

25 THE WITNESS: That's what I'm looking at right now.

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2094

1 Q And there's some other Fisher products, for example the
2 next one listed, Fisher Lightning product; is that right?

3 A It's not up on the screen, but -- right now.

4 Q We'll try to get it up on the screen for you here.

5 A Yes, I see that.

6 Q These were some prior Fisher products that would help with
7 the electronic order entry and purchasing and things like that;
8 correct?

9 A That's correct.

10 Q But you disclosed no literature at all to the Patent
11 Office, no publication at all that related to the RIMS system,
12 did you?

13 MR. ROBERTSON: Objection, Your Honor. No allegation
14 in this case whatsoever that the inventors withheld anything
15 material from the Patent Office. There's nothing within the
16 Court's final pretrial order that was agreed upon that would
17 have any relevancy to whether or not they disclosed the RIMS
18 publication. As Your Honor observed, they incorporated by
19 reference the RIMS patent.

20 MR. McDONALD: This is testifying by Mr. Robertson at
21 this point.

22 THE COURT: It's also something I think I've ruled on
23 and I think the witness testified about it earlier, if I
24 remember. There's a statement about the RIMS patent in column
25 one right up at the top, and he said, yes, we told them that.

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2095

1 That's what -- whether you like that answer or not, that's the
2 one he gave before. Has it changed?

3 MR. McDONALD: Your Honor, I'm just clarifying that
4 there were no publications regarding the RIMS system that were
5 disclosed to the patent. I don't think that's even disputed
6 yet at all, but --

7 THE COURT: That's not an issue in the case.

8 MR. McDONALD: Yes, it is.

9 THE COURT: What is it?

10 MR. McDONALD: That the RIMS brochure, the fact that
11 the RIMS system was on sale. That is a discrete piece of prior
12 art --

13 THE COURT: That doesn't mean it was disclosed. You
14 don't content that it wasn't disclosed. You contend that it
15 was on sale. They are two different proof items.

16 MR. McDONALD: Well, we're going to prove both, it
17 was on sale --

18 THE COURT: Is that an issue in the case? I don't
19 remember --

20 MR. McDONALD: The fact that the RIMS system was on
21 sale as prior art --

22 THE COURT: No, no, no. I know that is an issue.
23 The failure to disclosure is not an issue.

24 MR. McDONALD: They have disputed, and we dispute
25 that the patent --

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1 THE COURT: That's not what I -- I just want you to
2 listen. I think you need listen. Is that, is the failure to
3 disclose an issue; yes or no? Is it an issue that's in the
4 case? Did you raise it as a defense?

5 MR. McDONALD: It's not -- that answer -- it's hard
6 to answer that question because it is disputed whether or not
7 the Patent Office did consider it.

8 THE COURT: That's not the issue, what they
9 considered. It's what was disclosed. Listen. Are you
10 contending that there was a failure to disclose on the Patent
11 Office? I don't remember it.

12 MR. McDONALD: It's not a separate defense, Your
13 Honor, but it's part of our explanation of why the Patent
14 Office did what they did here, that it wasn't disclosed, and,
15 therefore, the Patent Office --

16 THE COURT: Then the question is simply this: Was
17 one of those brochures listed in the other publication; right?

18 MR. McDONALD: Yes.

19 THE COURT: Then ask that. Quit using the words that
20 animate a defense that you haven't actually pleaded.

21 Q Mr. Momyer, would you agree that at least here in the '683
22 patent -- if we can back up to that whole list of publications
23 and blow that up as best we can -- that there's no RIMS, no
24 reference to any RIMS publications or literature in that list?

25 MR. ROBERTSON: I understand the Court's ruling. I

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2098

1 Q The second one, IBM Technical Viewer/2 product information
2 and brochure, IBM Corporation undated; right?

3 A Yes.

4 Q And so even though the TV/2 system is mentioned in the
5 body of the patent, you also disclosed and listed these other
6 publications involving TV/2; correct?

7 A Yes.

8 Q But you didn't do that for the RIMS system; did you?

9 MR. ROBERTSON: Objection, asked and answered three
10 times.

11 THE COURT: Yes. I agree. Sustained. You don't
12 have to answer.

13 Q Now, at the time -- if we can go back to the cover page
14 here, when this application for the patents-in-suit was filed
15 in August of 1994 --

16 THE COURT: Excuse me, Mr. McDonald. This is not the
17 application. You said when this application. This isn't the
18 application. It's the final issued patent.

19 If you want to ask him about the application, then
20 get the application in front of him or -- you all have to
21 remember something. You all deal with these terms all the
22 time. The jury doesn't, and it's easy for the jury to be
23 confused, and I'd like you to make sure your question is
24 precise. If you want to ask him about the application, do
25 that. If you want to ask him about the patent, that's fine,

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1 too. Just be precise.

2 MR. McDONALD: That's fair enough.

3 Q Mr. Johnson, I think just to keep our dates straight here,
4 I think you talked about the RIMS application --

5 MR. ROBERTSON: I think you misspoke. You called him
6 Mr. Johnson.

7 MR. McDONALD: At least I didn't call him Dr. Weaver.

8 Q Mr. Momyer, you recall that the RIMS application for the
9 patent was filed in April of '93 'right?

10 A Yes.

11 Q I think we talked earlier, it was actually issued in '98;
12 correct?

13 A Yes.

14 Q So the patent application that gave rise to the '683
15 patent as shown here, that was filed in August of '94; correct?

16 A That's correct.

17 Q So at that point, the RIMS patent hadn't issued yet;
18 right?

19 A Yes.

20 Q So when you filed it, you weren't trying to tell the
21 Patent Office in August of '94 that the RIMS patent had
22 actually issued and would be considered prior art as an issued
23 patent, were you?

24 MR. ROBERTSON: Objection, that lacks foundation and
25 calls for legal expertise that I'm not sure this witness has,

1 (The jury is present.)

2 THE COURT: Cross-examination.

3

4 CROSS-EXAMINATION

5 BY MR. ROBERTSON:

6 Q Good morning, Mr. Momyer.

7 A Good morning.

8 MR. ROBERTSON: I'd like you to put the '683
9 patent up, Exhibit No. 1, specifically column 1
10 starting at line 10 going down to about line 17.

11 Q You recognize this as the '683 patent, you're
12 patent?

13 A Yes.

14 Q I'm sorry?

15 A Yes.

16 Q Did you disclose in your patent and the Patent
17 Office that there were a number of known --

18 THE COURT: Can you speak up, please.

19 MR. ROBERTSON: Sure, Your Honor. I'm sorry.

20 Q Did you disclose to the Patent Office in your
21 patent that there are a number of known
22 requisition/purchasing systems that manage and process
23 requisitions and purchase orders, one such system is
24 the Fisher-Scientific Requisition and Inventory
25 Management System, Fisher RIMS, described in United

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2129

1 States No. 5,712,989 filed April 2, 1993, and assigned
2 to the Fisher-Scientific Company of Pittsburgh,
3 Pennsylvania, the disclosure of which is incorporated
4 herein by reference; do you see that?

5 A Yes, I do.

6 Q Did you make that representation to the Patent
7 Office?

8 A Yes.

9 Q Why did you do that, sir?

10 A Well, RIMS was an inventory control purchasing
11 requisition system, and we actually would use the
12 basis for RIMS to build the component for the
13 electronic sourcing application.

14 Q So did you want them to be aware that such a
15 system existed out there?

16 A Yes.

17 Q Can you go down to about line 35? Just the first
18 two lines. There's a statement in your patent that
19 says, Other requisition/purchasing systems can be
20 grouped broadly into four classes; do you see that?

21 A Yes.

22 Q Just generally, if you would just refer to your
23 patent, did you go on to describe for the Patent
24 Office what those four classes of requisition
25 purchasing systems were?

MOMYER - CROSS

2138

1 starting at about line 20. If you could read over to
2 the top of page 100.

3 A Page --

4 Q 99 starting at line 20 at the bottom.

5 A Okay.

6 Q And going over.

7 A Sorry, Mr. Robertson. I'm having trouble with the
8 page. 93, 94 to 97, 98 to what?

9 MR. ROBERTSON: 99, starting at line 20. It
10 says, Question: Welcome back.

11 A 99, line 20, yes, I see that.

12 Q Why don't you read that over to page 100 down
13 through line 9. Just read it to yourself, sir.

14 A How far did you want me to read?

15 Q Down to line 9.

16 A Okay.

17 Q Now, you were asked a question concerning when the
18 RIMS product was complete. Do you see that shortly
19 after the luncheon break?

20 A Yes.

21 Q Does that fresh your recollection now as to what
22 you told the attorney under oath in your testimony as
23 to when the RIMS system was completed?

24 A Yes.

25 Q What does it refresh your recollection to be and

MOMYER - CROSS

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1 what did you indicate there?

2 A Pretty much what I just said. We continue
3 developing RIMS up until I left Fisher.

4 MR. McDONALD: Your Honor, I don't know what
5 he's referring to at this point, but I think the
6 question and answer should just be red.

7 MR. ROBERTSON: I'm happy to do that, Your
8 Honor.

9 THE COURT: He asked if it refreshed his
10 recollection, and he said yes. What was the
11 recollection that was refreshed? He's entitled to
12 answer how it was refreshed. And if you'd like to
13 read the question and answer, both of you, go ahead.

14 BY MR. ROBERTSON:

15 Q Well, I thought you had answered the question, but
16 I understood you to say it refreshed your
17 recollection. So what recollection was refreshed by
18 referring to this testimony that you gave under oath?

19 A My recollection was that the RIMS system was an
20 evolutionary system that continued to be developed
21 over a period of time up to and through 2000, 2003.

22 Q Is it your testimony there under oath consistent
23 with your recollection now?

24 A Yes.

25 Q Can we just go to the RIMS patent? The RIMS

MOMYER - CROSS

2140

1 system is mentioned multiple times in your patent; is
2 that right?

3 A Yes, it is.

4 Q I've got just a graphic here of your '683 patent.
5 If we could just go along. Do you know how many times
6 RIMS is mentioned in this patent?

7 A No, I don't.

8 Q I've indicated here in red in each instance that
9 the RIMS system or the RIMS features or capabilities
10 are described or as modified. If we could just scan
11 through this. This is column 1 and 2, there's 3 and
12 4, 5 and 6, 7 and 8, 10, columns 11 and 12, 13, 14,
13 15, 16, 18. All right. Would it surprise you, sir,
14 if you disclosed RIMS functionality and feature in
15 your patent more than 55 times in your patent
16 application?

17 A No.

18 Q You weren't trying to mislead the Patent Office by
19 withholding descriptions of what the RIMS capability
20 was, were you?

21 A No, I wasn't.

22 Q Can you tell us whether or not you think you fully
23 disclosed the features and capability and the
24 revisions and modifications that were necessary in
25 order to come up with your electronic sourcing

Kinross - Direct

2211

1 MR. ROBERTSON: Objection, Your Honor. This has been
2 gone over in direct examination already.

3 MR. McDONALD: I'm trying to tie it into this
4 timeline, Your Honor. Now that we have some clarity on the
5 timing of everything, I think it's helpful to put it in the
6 context.

7 MR. ROBERTSON: Same timeline.

8 THE COURT: It seems to me like we're plowing old
9 ground, Mr. McDonald, and remember what I told you before we
10 started today? Let's go ahead.

11 Q I'd like to now turn, Mr. Kinross, to how much demand
12 there was for the system. We can take this off the screen
13 now -- for the system that corresponds to the patents that have
14 been asserted in this case.

15 Now, the SupplyLink was the brand name used for the system
16 described in the three patents in this case; right?

17 A Yes.

18 Q Is it true that only a small portion of RIMS customers
19 ever adopted the SupplyLink system to use with RIMS?

20 A Well, I think the system would have replaced RIMS, not
21 been used with RIMS.

22 Q Well, did some portion of RIMS customers adopt the
23 SupplyLink system to use with RIMS?

24 A Well, no. If you are getting SupplyLink, you don't need
25 RIMS anymore.

Kinross - Direct

2212

1 Q Turning to the patents-in-suit in, the patents-in-suit are
2 referred to as the RIMS system, RIMS in a number of places;
3 right?

4 A Yes.

5 Q Are there any places in any of the three patents-in-suit
6 where the RIMS system is specifically identified as prior art?

7 A I couldn't tell you. If I'd have to do a search to see
8 prior art.

9 Q You would agree that no documents related to the RIMS
10 system are identified on the cover pages of any of the three
11 patents-in-suit as a reference cited, wouldn't you?

12 MR. ROBERTSON: Objection, Your Honor. I mean, I
13 don't even know the relevancy of that question, but I don't
14 know how he could possibly have that in his memory.

15 MR. McDONALD: We can refer to the patents if you
16 need to, Mr. Kinross, if you don't know the answer.

17 MR. ROBERTSON: We have a stipulation, Your Honor,
18 that the '989 is incorporated by reference in the patents.

19 MR. McDONALD: That's not what we're taking about.
20 That stipulation has nothing do with my question.

21 THE COURT: You asked what was disclosed.

22 MR. McDONALD: Disclosed as a reference cited on the
23 cover of these patents as part of the information disclosure
24 process.

25 THE COURT: Whether it was disclosed on the cover or

Kinross - Direct

2213

1 disclosed in the text doesn't make any difference.

2 MR. McDONALD: Well, it makes a difference if that
3 one is prior art and the other one isn't.

4 THE COURT: Depends.

5 MR. McDONALD: Well, the information in the
6 disclosure statement is where --

7 THE COURT: I'm not going to get into that. Reframe
8 your question.

9 Q Would you agree with me that there are --

10 THE COURT: You've got a showing -- do you want me to
11 show you how to do it? You ask him, do you know what the prior
12 art references are on the patent, and if he says, yes, then you
13 say, okay, did they include that. If he says no, then you show
14 him the patent.

15 That's how you do it. He's told you three times he
16 does not remember everything in these patents or the other
17 ones, so just ask him the right way, and we will get going.
18 I'm going to put an end to it if we don't get going.

19 MR. McDONALD: I'm about wrapped up anyway, Your
20 Honor, but I'll --

21 THE COURT: All right. Do it the right way.

22 Q Mr. Kinross, could we go ahead and just put Plaintiff's
23 Exhibit 1, the '683 patent, up on the screen so you'll know
24 what we're talking about.

25 Go to the first page there, the part references cited --

Kinross - Direct

2214

1 there's a section, do you see in the lower left of what's blown
2 up on the screen, Mr. Kinross, the words references cited?

3 A Yes, I see that.

4 Q And over on the right side -- let's leave that up the way
5 you had it, Bill -- there's a list of patents. That list of
6 patents doesn't include the RIMS patent. That's number
7 5712989; correct?

8 THE COURT: You mean under references cited?

9 MR. McDONALD: Yeah, under the U.S. patents
10 documents, references cited.

11 Q It does not include 5719 -- excuse me, 5712989; correct?

12 MR. ROBERTSON: For the record, Your Honor, let me
13 pose a relevancy objection.

14 THE COURT: I think it's fairly obvious from reading
15 the patents whether it's in there or not, but let's go. Let's
16 get to it.

17 A I don't see it under references cited, no.

18 Q Then there's a few entries under the title other
19 publications on this page; right, Mr. Kinross? Right side
20 there?

21 A Yes.

22 Q And there's no reference to any RIMS publications there;
23 correct?

24 A That's correct.

25 Q If we go to the next page of the document, please, the

1 patent, the other publications listed there, give you a chance
2 to look at that. There are some Fisher Scientific product
3 publications listed on this page of the patent under the
4 heading other publications; right? Systems such as the
5 Lightning system or StockPro?

6 A Fisher StockPro, systems by Fisher inventory management
7 system.

8 Q Do you see any Fisher references in the other publications
9 page here to a publication regarding the Fisher RIMS system?

10 MR. ROBERTSON: Your Honor, I object. This is fairly
11 cumulative. We went through this exercise with Mr. Momyer. I
12 don't know why we need to do it again.

13 THE COURT: I am assuming that you have some question
14 that followed up there. If that was the only purpose, was to
15 establish what was there, then that's the end of it. Do you
16 have some following question?

17 MR. McDONALD: I don't have any other questions.

18 THE COURT: Thank you. Can he be excused
19 permanently?

20 MR. ROBERTSON: May I cross-examine him, Your Honor,
21 or redirect briefly?

22 THE COURT: Can you what?

23 MR. ROBERTSON: Can I cross-examine the witness?

24 THE COURT: I thought you had an opportunity to
25 cross-examine.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC.,
Plaintiff,
v.
LAWSON SOFTWARE, INC.,
Defendant.

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Civil Action
No. 3:09CV620
January 19, 2011

COMPLETE TRANSCRIPT OF **JURY TRIAL**
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE, AND A JURY

APPEARANCES:

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OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

1 to testify about. So he's not testifying as an expert
2 on infringement or validity. He's just saying this is
3 what I sold and here's its features.

4 THE COURT: What is his doctorate in?

5 MR. SCHULTZ: Electrical engineering.

6 MR. McDONALD: I don't know if that's
7 relevant.

8 THE COURT: It sounds to me like he's an
9 expert.

10 MR. McDONALD: No, no, no. He was there
11 selling this product. He was the head of the company.
12 I don't think we'll make a big deal about his
13 doctorate. He's a computer guy just like the IBM
14 people or the other folks. He just knows something
15 about computers. He's not an expert. And I don't
16 think the jury was confused about that with these
17 other witnesses, and I don't think they will be
18 confused with Mr. Staats.

19 MR. ROBERTSON: Your Honor, the confusion may
20 be resulting because at one point Lawson tried to
21 substitute Dr. Staats for Dr. Shamos and dropped Dr.
22 Shamos. You ruled that he couldn't testify as an
23 expert. They are representing he's going to be
24 testifying about this J-CON system. It's going to
25 come up with respect to the slides that we want to

2301

1 MS. STOLL-DeBELL: P.O. Writer. And he cites
2 to the various documents, in this case it's DX 17, to
3 show where P.O. Writer teaches this element.

4 THE COURT: All right.

5 MS. STOLL-DeBELL: Then skip column R and go
6 to column S.

7 THE COURT: S is his opinion re: J-CON.

8 MS. STOLL-DeBELL: Yes.

9 THE COURT: Okay.

10 MS. STOLL-DeBELL: And in this column you can
11 see he has quotes from the J-CON manual about where
12 J-CON teaches this element.

13 THE COURT: Yes.

14 MS. STOLL-DeBELL: He does this for every
15 element, which I agree, is required by KSR. You must
16 say where in each reference you're using in your
17 obviousness combination that reference teaches these
18 claim elements.

19 THE COURT: But nowhere does he explain in
20 this chart how the combination renders the matter
21 obvious. He does explain, according to you, and he
22 does this -- it's a funny way of saying things and
23 doing things, but it perhaps can be read to say that
24 P.O. Writer, standing alone, it helps render it
25 obvious. But, you see, the problem is he's really --

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1 this chart is built around anticipation, right?

2 MS. STOLL-DeBELL: No.

3 THE COURT: Yes.

4 MS. STOLL-DeBELL: No.

5 THE COURT: And then he says -- this is the
6 argument you made before. You told me to do this, and
7 I kind of understood it then. You said you take the
8 chart, and it was anticipation, and then if you read
9 the text of 236 it says to the extent it's not
10 anticipated, it's obvious, and you say it's the same.
11 Then as to a single reference, I can understand that
12 perhaps that's one way to read this. Are you
13 following me?

14 MS. STOLL-DeBELL: I am, and I think that --

15 THE COURT: That's what you just told me,
16 right?

17 MS. STOLL-DeBELL: I told you earlier, yes.
18 There is obviousness for a single reference in this
19 chart. There's obviousness for a combination of
20 references and there's anticipation.

21 THE COURT: Where is the obviousness for the
22 combination of J-CON and P.O. Writer in this chart?

23 MS. STOLL-DeBELL: This chart, all it does is
24 say where each reference teaches each claim element.
25 Then you go back to the report.

1 THE COURT: Which report? Where?

2 MS. STOLL-DeBELL: To his report.

3 THE COURT: What paragraph?

4 MS. STOLL-DeBELL: Well, let's look at
5 paragraph 104. That's where he says, My Exhibit 3 is
6 an invalidity chart. And it deals with anticipation
7 and obviousness. And he also explained this to
8 Ms. Albert in his deposition. You have to read them
9 together, Your Honor.

10 THE COURT: Do you have to read them
11 together, but nowhere do I see where the combination
12 is explained. That's what I'm trying to get to.

13 MS. STOLL-DeBELL: So there are two parts you
14 have to show for obviousness.

15 THE COURT: And I don't want to have any
16 general sentence or statement. I want it he says in
17 paragraph such and such at sentence such and such that
18 there is this combination analysis that's made for
19 these two things. Where does he say that?

20 MS. STOLL-DeBELL: We go back to 236. But
21 what I'm saying, Your Honor, for obviousness you have
22 to have two things, right? You have to have an
23 element by element analysis to show that somewhere
24 within your combination of references they teach all
25 of the elements of the claim. That's what

1 Mr. Robertson was saying with KSR. That's what the
2 claim chart does.

3 Then you also have to show for obviousness
4 that there is a reason to combine them together.
5 That's what paragraph 236 does.

6 THE COURT: But the predicate is that there
7 are two elements that are combined, and he doesn't say
8 that in the chart that I see.

9 MS. STOLL-DeBELL: No, he says that in
10 paragraph 236. He says all of the elements for both
11 references are taught in Exhibit 3. And I would
12 combine them for these reasons.

13 THE COURT: Where?

14 MS. STOLL-DeBELL: 236.

15 THE COURT: I'm trying to get there. Okay.
16 All right. Okay. Excuse me.

17 It is my opinion that such claim would have
18 been obvious in view of the combination of J-CON with
19 P.O. Writer, right?

20 MS. STOLL-DeBELL: Yes.

21 THE COURT: Where does he say the reasons?
22 The only thing that I see that remotely resembles
23 reasons in 236 is -- that's a conclusion that he just
24 stated. The reasons sentence is as follows: The same
25 reasons for making the previous two combinations

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1 apply. Now, what are the previous two combinations?

2 MS. STOLL-DeBELL: So we have to go to -- he
3 talks about RIMS plus Dworkin. That's the first of
4 the two. And that starts at paragraph 65.

5 THE COURT: What's the next one?

6 MS. STOLL-DeBELL: I'm sorry. Page 65, Your
7 Honor.

8 The second combination is J-CON plus Dworkin,
9 and that starts at paragraph 230 on page 67. So --

10 THE COURT: Page what?

11 MS. STOLL-DeBELL: Page 67, paragraph 230.

12 In both of those he explains that all of the claims he
13 believes are obvious as shown in Exhibits 3 and 4.

14 So, for example, I'm reading paragraph 230 of
15 page 67. And then he goes on to explain his reasons.
16 EPlus contends that J-CON is a single source system.
17 P.O. Writer is a multiple source system. Or he says
18 that with J-CON and Dworkin.

19 THE COURT: But he's not going to testify
20 about it.

21 MS. STOLL-DeBELL: He's not.

22 THE COURT: About RIMS plus Dworkin.

23 MS. STOLL-DeBELL: He's not actually.

24 THE COURT: Where are the imported reasons
25 then? Help me with -- let's take what begins on page

1 65 with the combination of RIMS plus Dworkin, 940.

2 Where is the reason?

3 MS. STOLL-DeBELL: Well, so the reasons start
4 at paragraph 225 on page 66. But, Your Honor, I'll
5 tell you that Dr. Shamos, as far as his reasons for
6 combining J-CON and P.O. Writer, he looks at what he
7 says in paragraph 236 for that. And then he will rely
8 on what he says in this claim chart for the element by
9 element analysis.

10 So I don't intend to have him get up and talk
11 about RIMS plus Dworkin or --

12 THE COURT: But he can't even do -- so you're
13 not -- you're taking that sentencing out of the
14 equation then?

15 MS. STOLL-DeBELL: Yes, because I don't think
16 we need it. I think he's got a reason why he would
17 combine J-CON and P.O. Writer in paragraph 236 and
18 that's what he'll testify to.

19 THE COURT: I'm not talking about that.
20 You're taking out the sentences, out of 36, that the
21 same reasons for making the previous two combinations
22 applies to combining J-CON system as described in the
23 J-CON system with P.O. Writer Plus V 10 as described
24 in the P.O. Writer Plus manual. You're taking all of
25 that out.

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1 MS. STOLL-DeBELL: I'm taking all of that out
2 except to the extent that they say his opinions on
3 element by element are shown in Exhibits 3 and 4.

4 THE COURT: Where is Exhibit 3 and 4?

5 MS. STOLL-DeBELL: Exhibit 3 is this claim
6 chart we just looked at. That's Exhibit 3.

7 THE COURT: Okay. What's 4?

8 MS. STOLL-DeBELL: Four is just a shorter --
9 a shorter version of this.

10 THE COURT: Of 3?

11 MS. STOLL-DeBELL: Yes. It doesn't get into
12 the actual citations.

13 THE COURT: Okay.

14 MS. STOLL-DeBELL: I don't think we need to
15 look at Exhibit 4.

16 THE COURT: Then that takes us back to
17 whether this claim chart that he did shows a
18 combination.

19 MS. STOLL-DeBELL: I agree.

20 THE COURT: Where does he show a combination?

21 MS. STOLL-DeBELL: It shows where each
22 reference teaches each element. The reason to combine
23 those references are in paragraph 236 of his report.

24 THE COURT: And the reason is, "It is my
25 opinion that such claim would have been obvious in

1 view of the combination of J-CON with P.O. Writer," is
2 that right?

3 MS. STOLL-DeBELL: Plus it goes on to say,
4 The P.O. Writer system provided a multiple vendor
5 capability demanded by the industry at and before the
6 time of the invention. J-CON included features that
7 one of ordinary skill in the art would be motivated to
8 use with the P.O. Writer system including additional
9 details about performing cross referencing of data
10 relating to an item or requisition to determine an
11 alternative source for the same item and/or an
12 acceptable substitute for the item initially selected.

13 THE COURT: Where does he talk about the
14 Exhibits 3 and 4 in this paragraph?

15 MS. STOLL-DeBELL: I think he mistakenly did
16 not refer to Exhibit 3 in this paragraph, Your Honor,
17 so for that I would refer back up to the two earlier
18 combinations, paragraph 224 and 230, where he says his
19 obviousness opinions are shown in Exhibit 3, which is
20 the one we're talking about here.

21 THE COURT: What paragraph?

22 MS. STOLL-DeBELL: Paragraph 224.

23 The second to last line of paragraph 224 on
24 page 65, he says the combination teaches all of the
25 elements of the asserted claims. And then if you go

1 on to page 66, first line, As shown in Exhibits 3 and
2 4.

3 THE COURT: Exhibits 3 -- I mean, 4 is
4 nothing but something less than 3?

5 MS. STOLL-DeBELL: Yes.

6 THE COURT: So I don't need to pay attention
7 to it.

8 MS. STOLL-DeBELL: No. Then he does the same
9 thing again at paragraph 230. He says the combination
10 teaches all of the elements. I'm at page 67,
11 paragraph 230, THE fourth line down. The combination
12 teaches all the elements of the asserted claims as
13 shown in Exhibit 3.

14 THE COURT: Okay.

15 MS. STOLL-DeBELL: I mean he should have said
16 that again for J-CON and P.O. Writer, but he did refer
17 back up. So he was maybe being shorter than what he
18 should have been. But the bottom line is the
19 combination is taught in Exhibit 3.

20 THE COURT: All right.

21 MS. STOLL-DeBELL: Which is the claim chart
22 in front of you. Also, Your Honor, at paragraph 104
23 of his report, which is on page 27 -- actually, I'm
24 sorry. It's paragraph 102 at page 26.

25 THE COURT: 104 says to the extent that any

1 reference.

2 MS. STOLL-DeBELL: I meant to direct you to
3 paragraph 102, page 26. I'm sorry.

4 THE COURT: 102.

5 MS. STOLL-DeBELL: This is talking about what
6 Exhibit 3 is, which is the claim chart that you looked
7 at.

8 Exhibit 3 is an integral part of his report
9 and contains a claim chart demonstrating the
10 invalidity of each asserted claim.

11 Exhibit 3 is a spreadsheet in which the rows
12 are claim elements and steps and columns are prior art
13 references. A cell corresponding to an element and a
14 reference contains text if the element is disclosed in
15 the reference or is obvious in light of the reference.
16 The color coding is explained.

17 THE COURT: All right. Anything else?

18 MS. STOLL-DeBELL: Yes. In his deposition,
19 he explained this in detail. They asked him. "Are
20 you asserting the combination of J-CON and P.O.
21 Writer?"

22 He answered: Yes.

23 Ms. Albert went through -- she printed up her
24 version of that Exhibit 3 and he went through and he
25 explained exactly what it meant, and that it did, in

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1 fact, show both anticipation and obviousness. And
2 walked her through exactly how it was and how the
3 combinations worked and how they tied back to his
4 report.

5 THE COURT: What does that do? Because he's
6 to do this in perspective of his report, not in his
7 deposition. Do you understand?

8 I think maybe you-all have lost sight of
9 something. In 1993, the federal rules were amended.
10 They were amended to prohibit just this sort of
11 gamesmanship that's going on here. They were amended
12 to say that an expert must put in his report all of
13 the things that he's going to rely on, the statement
14 of reasons, and it must be complete.

15 The very idea, if you look at the history of
16 it, was to allow me as the receiver of the report to
17 decide, Well, I'm happy to just rely on this
18 deposition if I want to because it's got everything in
19 it. And the other reason was that the expert cannot
20 go beyond what was in that report. And if he steps
21 one foot outside that boundary, he cannot testify to
22 that issue. And you-all seem to have the view that
23 these rule changes didn't mean anything.

24 And this expert is -- this is the amazing
25 thing to me about the way this guy has done his

1 cross-examination. And that's what has to be done
2 here. That's the cure. Plus the need to have its own
3 expert reassess all of the testimony now being offered
4 in the form that it's now being offered in order to
5 adjust to the surprise.

6 And that would be a method that conceptually
7 could be available to cure, but to do that would allow
8 this testimony, if presented, by Dr. Shamos to disrupt
9 the trial. And I don't really have any good
10 explanation on the record for failure to sort this out
11 in the way that they were going to use it at trial.

12 I've told the parties from the beginning they
13 needed to sort this out specifically. And I on
14 numerous occasions said the consequence can be
15 exclusion, and you need to be aware of all that and
16 tried to give the parties an opportunity to make sure
17 they understood what the consequence were. And so I
18 don't find the explanation for the failure to disclose
19 what should have been disclosed adequate. And the
20 importance of the testimony, it's the lynchpin of the
21 J-CON, P.O. Writer obviousness argument, and so it's
22 critical, and it's important to both sides, obviously.

23 Applying all those tests, I find that there
24 has been a failure to disclose as required, and the
25 sanctions are imposing of attorneys' fees, inform the

1 jury of the failure are other sanctions including any
2 of the others listed in 37(D)(2)(a) 1 through 6 and
3 (B)(2)(a) 1 through 6, directing that matters embraced
4 in the order or other designated facts be taken as
5 established for purposes of the action as the
6 prevailing party claims, prohibiting the disobedient
7 party from supporting or opposing designated claims of
8 defenses or from introducing designated matters in
9 evidence, striking pleadings in whole or in part,
10 staying further proceedings until the order is obeyed,
11 dismissing the action or proceeding in whole or in
12 part, rendering a default judgment against the
13 disobedient party. I believe that's the right
14 reference, (a) 1 through 6.

15 So the remedy here is, the only practical
16 remedy given the situation, is to preclude the
17 testimony of Dr. Shamos on the issue of combination of
18 J-CON and P.O. Writer. The motion to that extent is
19 granted.

20 Now, you said there's something else about
21 Dr. Staats.

22 MR. ROBERTSON: Yes, Your Honor. Can I refer
23 you back to Dr. Shamos' report beginning at page 68?

24 THE COURT: Well, let me ask you this
25 fundamental question. Can an invalidity or

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1 evidence that Staats would give about the J-CON system
2 is relevant to support the opinions that Shamos would
3 give in 242, 246 and 247. Why can't Shamos do that?
4 I mean, why can't Staats do that?

5 MR. ROBERTSON: Dr. Staats would give Dr.
6 Shamos' opinions in those paragraphs?

7 THE COURT: Oh, come on.

8 MR. ROBERTSON: I don't understand.

9 THE COURT: For Pete's sake. Just listen.
10 What she said, and it's simple as it can be, and I
11 don't want to spend a lot of time reiterating things
12 you're not listening to. Staats testifies about the
13 components and the operation of J-CON, she says, in
14 order to provide a factual basis for this testimony
15 forecast in paragraphs 242, 246 and 247 of the Shamos
16 report, which go to the secondary considerations,
17 which secondary considerations are pertinent still in
18 the case because there still is an obviousness issue
19 on RIMS and TV/2.

20 Why can't Staats testify about that topic,
21 that kind of topic?

22 MR. ROBERTSON: Well, if Staats can testify
23 he has a prior art system that he says allowed
24 comparison shopping among multiple vendors, and that's
25 it, then if it's limited to that, fine. If it's going

1 to be 2 1/2 hours of him describing the entire system
2 that is no longer relevant to invalidity, I don't
3 understand what the purpose is. If he wanted to say,
4 for example, that --

5 THE COURT: No. So he can do that as long as
6 his testimony is confined to those issues.

7 MR. ROBERTSON: On paragraphs 242, 246 --

8 THE COURT: Yes, that's what she said.

9 She also says that this issue of J-CON being
10 combined with P.O. Writer can go to the jury without
11 an expert, and that your objection to Staats'
12 testimony on other aspects of the J-CON operation is
13 not well taken even in the face of the ruling that
14 keeps out Dr. Shamos' testimony on that issue because
15 the issue can go to the jury without an expert.

16 Isn't that your second point, Ms.
17 Stoll-DeBell?

18 MS. STOLL-DeBELL: Yes, Your Honor.

19 THE COURT: What's your response to that?

20 MR. ROBERTSON: My response to that is I
21 haven't had an opportunity to look at the case she's
22 referenced. I don't believe that that is, in fact,
23 the case, but if it is, I'm certain it's going to be
24 in a case that is of such simple technology with a
25 lack of complexity that the cases that I have cited to

1 Your Honor in which an expert has to provide some sort
2 of roadmap and guidance.

3 THE COURT: Have you got the case?

4 MS. STOLL-DeBELL: I do.

5 THE COURT: Give it to him.

6 I'm going to take a break and let the court
7 reporters shift, and I'll finish this up, and then
8 we're going to get going with the testimony.

9 MS. STOLL-DeBELL: We're going to deal with
10 all this issue and ask only that Staats be put on to
11 do a factual predicate for paragraphs 242, 246 and
12 247, and withdraw our request to put the issue of
13 J-CON plus P.O. Writer -- whatever paragraphs I said.

14 THE COURT: You said 242, 246 and 247. And
15 he's saying 244. And you didn't talk about that.

16 MS. STOLL-DeBELL: Your Honor, I guess I
17 missed a paragraph when I was talking about it.

18 THE COURT: You want to include 244?

19 MS. STOLL-DeBELL: Yes, I would.

20 THE COURT: That's all right. That happens.

21 MS. STOLL-DeBELL: But we're going to
22 withdraw our request to put P.O. Writer plus J-CON to
23 the jury without an expert.

24 THE COURT: All right. Thank you.

25 We'll take a recess and we'll come can and he

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1 can testify to that.

2 How long will his testimony be?

3 MR. SCHULTZ: About 45 minutes, Your Honor.

4 THE COURT: All right. Thank you very much.

5 We'll take a recess. Tell the jury.

6 Did we order lunch for them?

7 MR. LANGFORD: They are eating downstairs.

8 THE COURT: Are they down there now?

9 MR. LANGFORD: No.

10 THE COURT: Can they go on down there now?

11 MR. LANGFORD: Yes.

12 THE COURT: Let's let the jury go to lunch
13 and we'll take a lunch recess. Then we'll come back
14 at 1 o'clock and be ready to go with the whole
15 shooting match including Dr. Shamos.

16 Thank you.

17 (Luncheon recess at 12:01 p.m.)

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Shamos - Direct

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1 sort of a long-felt but unmet need that the patents-in-suit
2 would have addressed?

3 A Yes. Long-felt and unmet need is very close to failure of
4 others.

5 Q Did you find that there was some long-felt but unmet need
6 in the marketplace that the systems in the patents-in-suit
7 addressed?

8 A No. The need was met, so there's no unmet need.

9 Q Are you familiar with the product called PO Writer?

10 A Yes.

11 Q How did your analysis of the PO Writer product relate to
12 your assessment of the secondary considerations on obviousness?

13 A PO Writer is an example of a prior art system that met the
14 need, so thus proving that there was no unmet need.

15 Q Can we go to slide number ten, please. Is this a slide
16 you prepared, Dr. Shamos, regarding the PO Writer system?

17 A Yes.

18 Q Can you walk us through what you are showing us here on
19 slide number ten?

20 A Yes. This is from DX-117, and I apologize again for the
21 poor quality of the original, but I thought it was more
22 effective to take it right out of the original.

23 Q When you say the original, what are you talking about?

24 A Well, the original document that was admitted as DX-117.

25 Q What is DX-117?

Shamos - Direct

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1 A It's a literature describing -- it's a manual describing
2 the PO Writer system.

3 Q Why don't you go ahead and walk us through what you have
4 here on slide ten.

5 A Yes. Well, in PO Writer, you could specify a catalog for
6 searching and give a partial specification of an item. And so
7 it says at the top, for example, say you want to display all
8 items in the --

9 MR. ROBERTSON: I object, because in the section of
10 this gentleman's report, there's no specific citation to these
11 documents that he's now referring to.

12 MR. McDONALD: He refers to the secondary
13 considerations specifically --

14 THE COURT: Give me the page, and I'll look at it and
15 we'll go from there.

16 MR. McDONALD: We've got the section here on the
17 unmet needs.

18 THE COURT: What paragraph, page and paragraph are
19 you talking about?

20 MR. McDONALD: In Dr. Shamos's report beginning at
21 page 70.

22 THE COURT: 7-0?

23 MR. McDONALD: Yes.

24 THE COURT: Just a minute. And what paragraph?

25 MR. McDONALD: Beginning at the top of the page

Shamos - Direct

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1 there, 241. He's going through the analysis there of the
2 benefits of the system and whether other prior art systems
3 existed --

4 THE COURT: It says, though, that he didn't cite this
5 document. Isn't that the objection, Mr. Robertson? And the
6 rule, federal rule says that you shall identify every document
7 or reference that forms the basis of your opinion as part of
8 your report, and the objection is it's not -- this document
9 isn't identified, and there is no document identified in
10 paragraph 241 that I know of.

11 MR. McDONALD: Okay. So what it does say on the
12 third line of paragraph 241, the however -- actually begins at
13 the second line.

14 THE COURT: Second sentence. Okay, let me read that.
15 Well, that doesn't cite the specific reference; therefore, it
16 doesn't comply with the requirement of Rule 26 that the
17 specific reasons for the inclusions be articulated, so it's not
18 compliant with the disclosure requirement of 26(e), and the
19 objection is sustained to the use of that document unless it's
20 somewhere else disclosed in the record, and if it is -- that
21 paragraph doesn't do it, is all I was trying to say rather
22 inarticulately.

23 MR. McDONALD: The PO Writer system and the manual
24 cited, specifically at paragraphs 180 through 180 --

25 THE COURT: Just a minute. What paragraph?

Shamos - Direct

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1 MR. McDONALD: Let's zero in on 181 at page 54.

2 THE COURT: Paragraph 181.

3 MR. McDONALD: That's right.

4 THE COURT: What sentence does it cite this exhibit?

5 MR. McDONALD: The fourth line, it refers to the PO
6 Writer manual.

7 THE COURT: The parenthetical?

8 MR. McDONALD: Yes.

9 THE COURT: Is that where this is? Is that what this
10 is from?

11 THE WITNESS: I think it's actually paragraph 182.

12 MR. McDONALD: Actually what's on this page, if you
13 continue to the top of page 55, Your Honor, the next paragraph,
14 there's a specific cite to the PO Writer manual guided tour at
15 46 to 47. This excerpt, I understand, is right from those two
16 pages.

17 THE COURT: Is that correct, sir? You prepared it.
18 Is that where this reference came from?

19 THE WITNESS: It came from that manual. I can't
20 remember if it was exactly that page, but we can pull up that
21 page.

22 MR. McDONALD: Maybe that's the best thing to do.
23 How about I pull up that particular page.

24 THE COURT: Mr. Robertson, does that refresh your
25 recollection that this has been adequately disclosed?

Shamos - Direct

2500

1 MR. ROBERTSON: Your Honor, that exhibit has been
2 disclosed. I don't know if that particular page has. I'm as
3 befuddled as the witness and Mr. McDonald with respect to that.

4 THE COURT: So you want us to go look for that page
5 and see whether it does. Get us that exhibit and that page,
6 please.

7 MR. McDONALD: Put up Defendant's Exhibit 117, and
8 put up the guided tour at pages 46 and 47, please. I guess 46.

9 THE COURT: Just so the record is clear, it's not the
10 guided tour at page 22 and 130, 31 in paragraph 81. It is the
11 reference in paragraph 182 to the guided tour at 46 and 47; is
12 that where this is from?

13 MR. McDONALD: Can you blow up page 46 from
14 Exhibit 117? In the lower left there is a number 46. Does
15 that also correspond -- go back to the main page, please. Is
16 that also in the lower right corner L0126576? That's what's
17 cited on the slide, Your Honor. This is that page 46 that is
18 exactly the page --

19 THE COURT: So do you stand down?

20 MR. ROBERTSON: I'll accept the representation. It
21 is in a different completely section of the report that doesn't
22 have to do with secondary considerations, but I understand the
23 Court's ruling.

24 Q Let's go back to slide ten, Dr. Shamos.

25 A Yes.

Shamos - Direct

2501

1 Q Can you tell us what you are showing us here?

2 A Yes. Basically this says that if I want to restrict my
3 search to just the Bayless catalog, then I can search for a
4 particular item that has this partial description in just that
5 catalog. So this was done by PO Writer.

6 Q With respect to this issue of whether there's a long-felt
7 unmet need in the marketplace for something, how does this
8 relate to that particular secondary consideration?

9 A Well, the only thing that allegedly was missing, as least
10 at recited by the patents, is the ability to search multiple
11 catalogs, and this did that.

12 MR. ROBERTSON: I object to that, Your Honor.
13 There's no basis or foundation for that in the patent. That is
14 not -- the claims define what the invention is. There is no
15 characterization that's the only thing that was the missing.
16 That mischaracterizes the document, and that characterization
17 is certainly not in his report.

18 THE COURT: If what he says is true, we've been
19 trying this case for an awful long time on a lot of issues
20 other than that. I think maybe Mr. Robertson 's objection is
21 well-taken.

22 MR. McDONALD: If we go to paragraph 244 of Dr.
23 Shamos's report, you'll see he's referring to a discussion of a
24 purported need that actually ePlus had raised in their
25 interrogatory as a reason --

Shamos - Direct

2503

1 Q Let's go through your slides here. Let's go to slide 11.
2 Did you do some analysis as to whether or not the PO Writer
3 product would satisfy marketplace needs related to systems that
4 create a requisition?

5 A Yes.

6 Q What did you conclude about that?

7 A That's shown here, and that's, again, from the PO Writer
8 guided tour.

9 Q What is shown here?

10 A What's shown here is the creation of a requisition
11 containing multiple items from multiple catalogs, and you can
12 create -- in this case, it's Bayless catalog, but if you had
13 done a search over the entire database and found items from
14 more than one catalog, you could have created a requisition
15 with items from multiple catalogs.

16 Q Can we go to slide 12, please. Did you also look at
17 whether or not the PO Writer system met any market needs
18 regarding creating multiple purchase orders from the
19 requisition?

20 A Yes. This is creating multiple purchase orders from a
21 single requisition, and that's what the last sentence of the
22 citation says, a requisition can also be split creating any
23 number of purchase orders.

24 Q Are you again quoting from that same PO Writer guided tour
25 document?

Shamos - Direct

2504

1 A Yes, DX-117.

2 Q Did you look at whether or not the J-CON system also was
3 in existence before the patents-in-suit were filed that met any
4 of the needs in the marketplace at that time?

5 A Yes.

6 Q What was your conclusion about the J-CON system?

7 A That the J-CON system met numerous of the allegedly unmet
8 needs. In fact, apparently, all of them.

9 Q Did you look at any particular J-CON documents as part of
10 your analysis of the J-CON system?

11 A Yes. There was a huge J-CON manual, I think called volume
12 one. It was over a thousand pages long.

13 Q Can we put up the first page of Defendant's Exhibit 96,
14 please.

15 A That's it.

16 Q That's page one of that thing; is that right, Dr. Shamos?

17 A Yes.

18 Q What did you determine from reviewing the J-CON manual
19 about the features of that system that would be relevant to
20 whether or not that system met the market needs that were in
21 existence back in the early '90s?

22 MR. ROBERTSON: Your Honor, I'm going to object. It
23 calls for a narrative. That's a pretty wide-open question
24 there.

25 THE COURT: Do you want him to lead?

Shamos - Direct

2506

1 Q Can you walk us through this and tell us what features you
2 saw when you looked at Defendant's Exhibit 96 about the J-CON
3 system?

4 A J-CON maintained multiple catalogs, allowed you to do
5 product searches among the multiple catalogs. It enabled you
6 to create requisitions from the hit results that you got from
7 the catalogs. You could then generate multiple purchase orders
8 from a single requisition. You could do inventory checking and
9 also cross-referencing. You could convert a catalog number
10 from one vendor to that of another vendor.

11 Q Thank you. Can we go back to the PO Writer issue. Well,
12 actually, let's do this: Let's go back to slide number 90. I
13 want to make sure we have something clear here.

14 You mentioned that the, something about the structure in
15 these claims, claim elements corresponded to the structure in
16 the corresponding elements of claim three of the '683 patent.
17 I want to be clear, though. Was the function the same in these
18 two elements as it was in the '683 patent or not?

19 A I thought that there was an agreement that the means were
20 to be treated identically. There may have been slight
21 differences in the wording of the function. I don't recall.

22 Q Well, did you look at the Court's construction of the
23 function of those two means elements of claim one of the '172
24 patent?

25 A Oh, yes. But for the purposes of testifying here today,

1 fresh start in the morning at nine o'clock. If you'll leave
2 your pads with Mr. Neal.

3 Now, let me ask you something. Did you like those
4 donuts?

5 A JUROR: Yes, very much.

6 THE COURT: Would you like some more?

7 A JUROR: Sure.

8 A JUROR: I said that today.

9

10 (Jury out.)

11

12 THE COURT: We'll make a copy of this after this.
13 This involves the testimony of someone else, so I believe we
14 need to excuse Dr. Shamos. Thank you very much. He needs to
15 go get dressed for the Jets game.

16 THE WITNESS: Yes, sir.

17 THE COURT: Nine o'clock tomorrow morning, Dr.
18 Shamos.

19 THE WITNESS: Yes, sir.

20 THE COURT: Thank you very much. I'm going to leave
21 this question with you. Were PO Writer and J-CON patented. If
22 so, when? Next question -- I mean statement. Question -- I
23 don't know what this is, but it's below this. Didn't Dr.
24 Staats say that within a year of starting his company
25 Cooperative Computing, Inc., the company decided to stick to

1 their area of expertise which was the automotive industry? So
2 was the J-CON system only used for automobile purposes and
3 couldn't be used for, say, medical company purposes?

4 That's the way I read this. I think you'll be able
5 to read the same thing. I'm going to mark that as Court
6 Exhibit whatever it is. All right. Just get it before you
7 leave.

8 Also, somebody from each side can stay here and get
9 the instructions. What I did was take what you all tendered,
10 those that were agreed upon and the ones you differed, and the
11 objections, and have arrived at a set of instructions which I
12 think are appropriate. Some of the ones that were given were
13 rejected, and some were incorporated into the others.

14 You are going to have to worry about where all that
15 fits. I didn't spend a lot of time trying to cite what I did,
16 but I'm sure you're able to do that. I'm sure there are issues
17 in there that perhaps we aren't going to need anything on
18 because of the way the case has been tried, but I started off
19 with the concepts that each of you -- that you all, as a whole,
20 have put together and have instructions on those topics, I
21 think, with the exception of some of the things I've tossed
22 out.

23 So you can take a look at those and see. They'll be
24 ready in just a minute. Ms. Hooper is going to number them,
25 and then we will hereafter refer to them by those numbers, and

1 THE COURT: He actually ended up coming pretty close,
2 but for awhile I was beginning to think we were all going to
3 become grayer than we are.

4 MR. ROBERTSON: Well, the reason I think I can
5 streamline it some more is because J-CON is no longer prior
6 art, and we're going to be asking for instruction on that
7 because I think there is some confusion just from the jury's
8 question. J-CON is no longer being offered for any purposes of
9 invalidity --

10 THE COURT: If you want instructions, I want you all
11 to get me the instructions and get them to the other side in
12 plenty of time for me to think about.

13 MR. ROBERTSON: It might just be a matter of removing
14 the items listed or identified as the prior art in there. I
15 think PO Writer is no longer prior art for purposes of
16 invalidity or for any reason, so it's a matter -- that will
17 help me streamline my presentation of Mr. Hilliard.

18 THE COURT: Okay. All right. Is there anything else
19 that any of you -- I know you don't want to, but I've got life
20 that I've got to sort out for the next several weeks. So
21 you'll finish tomorrow?

22 MR. ROBERTSON: I'm fairly -- yes.

23 THE COURT: He may have some redirect, of course, of
24 Dr. Shamos. So that's Thursday. And then you're going --
25 we're going to have to deal with the instructions. I don't see

2532

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC.,
Plaintiff,
v.
LAWSON SOFTWARE, INC.,
Defendant.

:
:
:
:
: Civil Action
: No. 3:09CV620
:
: January 20, 2011
:

COMPLETE TRANSCRIPT OF **JURY TRIAL**
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE, AND A JURY

APPEARANCES:

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OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

1 yesterday? Court Exhibit 4.

2 Are P.O. Writer and J-CON patented, if so,
3 when? Didn't Dr. Staats say that it was within a
4 year?

5 Basically, what he said is for them to
6 remember. So was the J-CON system only used for
7 automotive purposes and couldn't be used, all that big
8 long text is something he testified to or didn't, and
9 they'll have to remember that testimony. And you-all
10 will address it in argument; is that right?

11 MR. McDONALD: I think that's fair, Your
12 Honor.

13 MR. ROBERTSON: Your Honor, I think the real
14 response, what I would suggest, Your Honor, is that
15 just you need not concern yourself with it. Whether
16 the J-CON system addressed auto parts or medical
17 systems, the J-CON system is not prior art in this
18 case, and that's why they don't need to consider it.
19 Dr. Shamos didn't over any opinions with respect to it
20 and I think this is just ripe for confusion if we say
21 it had some significance.

22 The same thing with were P.O. Writer and
23 J-CON patented. That's evidence of some confusion on
24 the part of the jury. First of all, they need not
25 concern themselves with whether J-CON or P.O. Writer

1 were patented at all because that was no bearing on
2 any issue in this case. Moreover, J-CON and P.O.
3 Writer are not prior art because there's been no
4 opinions on them.

5 THE COURT: I'm just going to tell them I'll
6 deal with this later.

7 MR. ROBERTSON: All right. There's one other
8 issue I wanted to bring to the Court's attention. In
9 the final pretrial order, there's a factual issue with
10 whether some of the claims had an adequate written
11 description as phrased. There's been no evidence
12 offered with respect to it.

13 THE COURT: They are still in their case.

14 MR. ROBERTSON: I'm sorry?

15 THE COURT: They are still in their case.

16 MR. ROBERTSON: They already called Dr.
17 Shamos and they're not presenting any additional
18 evidence on that. That's been represented to me by
19 Mr. McDonald.

20 THE COURT: Okay. He's the last witness, so
21 there's no more evidence on it.

22 MR. ROBERTSON: There's no evidence on it
23 whatsoever. So my question is do I need to call Dr.
24 Weaver? It's not that I need to rebut anything, but
25 Dr. Weaver is prepared to offer opinions that there is

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1 them. But they gave them to somebody else. I'm not
2 getting anymore donuts. So I had to wait anyway.

3 THE JURY: We appreciate it.

4 THE COURT: Dr. Shamos, you can come on back
5 to the witness stand. Thank you, sir.

6 DR. SHAMOS: Good morning.

7 THE COURT: Good morning.

8 I'll deal with the question that was asked
9 later. Okay? At the end of the day yesterday.

10 Dr. Shamos, I just remind you you're under
11 the same oath which you took yesterday.

12 THE WITNESS: Yes, Your Honor.

13 MR. ROBERTSON: May I proceed, Your Honor?

14 THE COURT: Sure.

15

16 CROSS-EXAMINATION

17 BY MR. ROBERTSON:

18 Q Good morning, Dr. Shamos.

19 A Good morning.

20 Q Dr. Shamos, these questions were asked of Dr.
21 Weaver, so I'd like to just ask them of you as well.
22 You are a retained expert on behalf of Lawson; is that
23 right?

24 A Yes.

25 Q And you are charging Lawson \$550 an hour for

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1 A Yes.

2 Q So the electronic sourcing system here is a very
3 specific electronic sourcing system that has to have
4 at least all six of these elements, right, sir?

5 A Yes.

6 Q So when you said that the J-CON system was an
7 electronic sourcing system, you weren't talking in
8 terms that J-CON had all these elements, correct?

9 A I didn't testify to that, no.

10 Q You didn't give any specific testimony on an
11 element by element, claim by claim basis with respect
12 to J-CON, correct?

13 A That's right.

14 Q In fact, you offered zero opinions that the J-CON
15 system from any version from 1988 to 1992 rendered any
16 of the 12 asserted claims here obvious in any way,
17 shape or form; isn't that right?

18 A Not in this courtroom, no.

19 Q Well, that's what's important. We're in the this
20 courtroom, right? So is the answer to my question you
21 offered zero opinions that J-CON invalidated or
22 rendered obvious any of the 12 claims?

23 A It's the same question, and I'm giving you the
24 same answer. I didn't do it in this courtroom.

25 Q Can you answer the question fairly yes or no? Did

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1 you offer it in this courtroom?

2 MR. McDONALD: Objection, Your Honor, asked
3 and answered.

4 THE COURT: Sustained.

5 Q Did you --

6 THE COURT: It doesn't make any difference
7 what he's testified to elsewhere, ladies and
8 gentlemen. It's only what is testified to here that
9 is important.

10 MR. ROBERTSON: Thank you, Your Honor.

11 BY MR. ROBERTSON:

12 Q You offered zero opinions that J-CON anticipated
13 any of the 12 claims at issue in this case here,
14 correct?

15 A In this room.

16 Q You offered zero opinions that J-CON in
17 combination with any other prior art reference
18 invalidates the claims in this courtroom, right?

19 A Right.

20 Q You are the only Lawson expert testifying on
21 invalidity opinions, right?

22 A I believe so.

23 Q You don't know of any other Lawson expert on
24 invalidity, do you?

25 A No.

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1 Q So as far as the jury is concerned with regard to
2 the testimony on J-CON, they can forget about that for
3 any purposes of an element by element, claim by claim
4 analysis for anticipation and obviousness, right?

5 A I don't know if it's my place to say what the jury
6 can forget about.

7 Q But you didn't give them any opinions that it
8 invalidates any claims, right?

9 A Not in this courtroom.

10 THE COURT: Well, you didn't give the jury
11 any, Dr. Shamos, so it had to be in this courtroom.
12 So the answer to that is no.

13 THE WITNESS: Correct.

14 Q And let me ask you this: You put up --

15 MR. ROBERTSON: Can you put up just the cover
16 page of Defendant's Exhibit No. 96, please.

17 Q Now, you showed this J-CON manual, Volume I, cover
18 page, correct?

19 A Yes.

20 Q That's the only thing you offered to the jury when
21 you brought up J-CON, this cover page that has the
22 title of the manual, and that's it, right?

23 A No, I had a slide with the bullet points about
24 J-CON.

25 Q I'm talking about this exhibit, Defendant's

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1 side, Mike, where it says "other publications."

2 BY MR. ROBERTSON:

3 Q You're aware, Dr. Shamos, that the inventors
4 disclosed to the Patent Office the two documents that
5 you rely on for your invalidity opinions; this IBM
6 Technical Viewer general information manual and this
7 IBM Technical Viewer/2 product information brochure,
8 correct?

9 A Yes.

10 Q And you understand that the product brochure is,
11 in fact, undated, correct?

12 A Yes.

13 Q You had no personal knowledge, do you, that either
14 of these documents were ever in the public domain
15 prior to August of 1993, do you?

16 A I have no direct personal knowledge of that.

17 Q So you understand that when these documents are
18 disclosed to the Patent Office, the Patent Office can
19 review them and consider them as part of the
20 examination, correct?

21 A Yes.

22 Q Now, let me ask you about this RIMS patent and the
23 disclosure in the patent at issue in this case. Is it
24 your position that the '989 patent was not disclosed
25 to the Patent Office?

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1 A It was not disclosed as prior art.

2 Q And you don't think when you disclose something in
3 the background of the invention it can be considered
4 by the Patent Office?

5 A Not for prior art purposes.

6 Q What's the basis of that opinion?

7 THE WITNESS: Your Honor, I can't answer that
8 question without violating a ruling of the Court.

9 THE COURT: It's a legal opinion.

10 Q Let me ask you this: Have you seen places where
11 the '989 patent was disclosed in the specification of
12 the patent?

13 A Not as prior art.

14 Q Have you seen places in the patent, sir, can you
15 answer my question, where the '989 patent was
16 disclosed?

17 A It is disclosed not as prior art.

18 Q Was it disclosed as incorporated by reference?

19 A Yes.

20 MR. ROBERTSON: Why don't we pull up column 1
21 of the '683 patent if we could.

22 Q If you'd go, please, to column 1, starting at line
23 10, going down to line 17. The inventors here are
24 telling the Patent Office that there are a number of
25 known requisition purchasing systems that manage and

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1 process requisitions and purchase orders. One such
2 system is the Fisher-Scientific requisition and
3 inventory management system, Fisher RIMS, described
4 United States Patent No. 5,712,989, filed April 2,
5 1993, and assigned to Fisher-Scientific Company of
6 Pittsburgh, Pennsylvania. The disclosure of which is
7 incorporated herein by references. Do you see that?

8 A Yes.

9 Q Do you understand that when someone incorporates a
10 patent by reference in the specification, it's as if
11 it was fully set forth therein, isn't it?

12 A Yes.

13 Q And you don't have any misapprehension that when
14 the inventors told the examiner and the Patent Office
15 about this patent that they couldn't fully understand
16 and comprehend that the inventors were saying
17 everything that's in this patent is now considered to
18 be part of the '683; isn't that right? That's what
19 incorporated by reference means?

20 A Yes.

21 Q And you're aware, are you not, sir, that the RIMS
22 patent and the RIMS system is mentioned in this patent
23 more than 50 times, right?

24 A Yes.

25 Q So, again, the examiner couldn't have been under

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1 any misapprehension as to what was being disclosed as
2 part of what RIMS functionality was necessary to be
3 modified in order to come up with the inventions of
4 the electronic sourcing patent, correct?

5 A Well, the examiner didn't consider it as prior
6 art. The examiner considered it for what it said
7 about the RIMS system.

8 Q Well, the examiner has access to be able to go and
9 look at any patent, doesn't he, that's available in
10 the Patent Office?

11 A Yes.

12 Q And if the inventors repeatedly throughout all 28
13 columns of the patent described what they thought the
14 RIMS system disclosed, he wasn't under any illusions
15 as to what they were representing, was he?

16 A He was under an illusion.

17 Q Oh, I see. So you know what the examiner was
18 thinking when he was reviewing the RIMS patent?

19 A Yes, I do because I read the file history. I read
20 what he said.

21 Q You didn't offer any opinions in direct testimony
22 with respect to the file history and what the examiner
23 said, did you, sir?

24 A No, but you're asking me about it now.

25 Q So the answer to my question is no, you didn't

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1 offer any opinions with respect to the file history,
2 correct?

3 A That's right.

4 MR. ROBERTSON: Could we go back and look at
5 Claim Three again.

6 Q Now, you understand that for purposes of both
7 infringement and invalidity you need to consider the
8 claim as a whole; is that right?

9 A Yes.

10 Q And just using this claim as an example, this has
11 six elements, I think, we've already confirmed, right?

12 A Yes.

13 Q And the preamble of the electronic sourcing system
14 is also an element of the claim the Court has
15 construed, right?

16 A Yes.

17 Q So when we go through this on an element by
18 element basis, you're familiar with the term what's
19 called an antecedent basis?

20 A Yes.

21 Q So let's look at the first element. The first
22 element says that the electronic sourcing system has
23 to have at least two product catalogs. I just want to
24 zero in on that. Right?

25 A Yes.

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1 Q Does it refer to figures 5A and 5B to support that
2 statement or not?

3 A Yes.

4 Q What does it indicate in terms of what system uses
5 the purchase order build program? Was it that local
6 computer?

7 THE COURT: Let him testify.

8 A Well, it says for items of product types 01, 03
9 and 04, local computer 40 uses purchase order build
10 program 112 to create a purchase order.

11 Q If we go to figure 2A of the '989 patent --

12 MR. ROBERTSON: Objection, outside the scope.
13 I didn't ask anything about figure 2A.

14 MR. McDONALD: It's referred to in this
15 paragraph that refers to 5A.

16 THE COURT: Well, that doesn't make it
17 something that was a topic of his examination.
18 Sustained.

19 BY MR. McDONALD:

20 Q Let's turn now to the patent, the file history,
21 Exhibit 4, that Mr. Robertson was asking you about.
22 He was asking you about whether or not -- well, let's
23 talk about the issue of whether or not there was a
24 disclosure to the Patent Office that any aspect of the
25 RIMS system was actually prior art. Did you look at

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1 the file history, Exhibit 4, to determine whether or
2 not the RIMS system was actually disclosed as prior
3 art?

4 A Yes.

5 Q What did you conclude about that?

6 A It wasn't.

7 Q What's the basis for that conclusion?

8 MR. ROBERTSON: Objection. This calls for
9 legal conclusions.

10 MR. McDONALD: He's asked the exact same
11 questions. I want to get a chance for him to explain
12 his reasoning.

13 MR. ROBERTSON: I didn't ask --

14 THE COURT: He didn't ask him the reasoning.
15 He volunteered that. Mr. Robertson opposed it.

16 MR. McDONALD: Well, the exact issue was is
17 the RIMS system disclosed as prior art.

18 THE COURT: I ruled. It's over. I'm not
19 going to have you testifying about the law.

20 BY MR. McDONALD:

21 Q Dr. Shamos, is there any documentation in the file
22 history of Plaintiff's Exhibit 4, the '683 file
23 history, that goes specifically to the issue of
24 disclosing prior art to the Patent Office?

25 MR. ROBERTSON: Objection, Your Honor. It's

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1 the same question asked in a way --

2 MR. McDONALD: This is a fact. I'm not
3 asking him for an opinion. This is a fact.

4 THE COURT: It's the same. It's another way
5 of doing the same thing, I think. There may be a
6 question you can ask. I'm not going to get into
7 asking it, but that isn't the one.

8 BY MR. McDONALD:

9 Q Dr. Shamos, is there -- I think you were asked
10 about whether the TV/2 documentation was considered by
11 the Patent Office, correct?

12 A Yes.

13 Q Now, is there something in the file history of the
14 '683 patent that would indicate how it was that the
15 TV/2 publications were disclosed to the Patent Office?

16 MR. ROBERTSON: I'm going to object, Your
17 Honor, because now we're just going over the direct
18 examination again. This was already asked in direct
19 and I didn't raise this issue again in my
20 cross-examination. I just asked him where the '989
21 was referenced in the file history and the
22 specification.

23 MR. McDONALD: You did ask him about the
24 TV/2.

25 THE COURT: Yeah, but not that. You're

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1 really retreading. You're repeating basically what
2 you said on direct examination, and that isn't what
3 redirect is about. So let's go on to something that
4 he actually asked about.

5 MR. McDONALD: Okay.

6 BY MR. McDONALD:

7 Q Can we go to the office action in the file
8 history? Turn to page, I think it would be about 182.

9 MR. McDONALD: Could you blow that up, Bill.
10 The number ending with 3720.

11 THE COURT: Do you want to blow the number up
12 or the picture up?

13 MR. McDONALD: I just want to help Dr.
14 Shamos --

15 THE WITNESS: I have it.

16 BY MR. McDONALD:

17 Q So this is the same office action you were asked
18 about earlier, correct?

19 A Yes.

20 MR. McDONALD: Can we go to the two pages
21 later, please. Its part of this office action.

22 THE COURT: Can you blow that up? Can you
23 read that, Dr. Shamos?

24 THE WITNESS: Well, I'm reading from the
25 original document.

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1 THE COURT: All right. Well, the jury is
2 being asked to look at it here, and I can't read it,
3 and I don't see how they can read it. So if you can
4 blow it up, let's get to where you want to go. Where
5 are you going?

6 MR. McDONALD: Paragraph No. 7 here from the
7 office action.

8 MR. ROBERTSON: I'm going to object, Your
9 Honor. I didn't ask anything about this page or
10 paragraph 7.

11 MR. McDONALD: Well, he was asking about this
12 in the context of the disclosure of the RIMS prior
13 art. I'd like to go to that exact same issue. They
14 are part of the same document and talk about that
15 issue of disclosure of RIMS as prior art.

16 MR. ROBERTSON: The only reason I sited this
17 office action was to show --

18 THE COURT: Come up here, please.

19 (The following sidebar conference is begun.)

20 THE COURT: Is it your view of the law that
21 if something is disclosed in the text of the patent
22 that it can't be considered as prior art unless it is
23 listed somewhere else in the patent as prior art? Is
24 that what you say the law is?

25 MR. McDONALD: I think the law is just

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1 because it's incorporated by reference does not
2 mean --

3 THE COURT: What case do you have that says
4 that?

5 MR. McDONALD: Well, I don't have a case. I
6 have all the Patent Office actions on the reexams.

7 THE COURT: I don't care about that. I care
8 about the law. What you're suggestion is something
9 that I don't understand to be the law.

10 And do you have a case on it?

11 MR. ROBERTSON: I have what's called the
12 MPEP, which is the Manual for Prosecution and
13 Examination Procedures, and I believe there's a
14 procedure in there that if it's disclosed in the
15 background of the invention, it's presumed that the
16 examiner has considered it. He can read, Your Honor.
17 It's there 59 times.

18 THE COURT: And there is no section in the
19 patent that says prior art?

20 MR. McDONALD: Well, the references cited is
21 the section that refers to the prior art.

22 THE COURT: No. That's how you refer to it,
23 but it doesn't call it prior art. It doesn't say --
24 is there any rule that says you have to put all of
25 your prior art in the references section?

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1 MR. McDONALD: That is, again, the MPEP
2 process is that you disclose prior art --

3 THE COURT: I didn't ask you that. I said,
4 Is there rule that says that? Not what they do, but
5 what is the rule?

6 MR. McDONALD: I believe there is a rule that
7 the Patent Office puts all the prior art in the list
8 of references cited. I don't have the rule cite at my
9 fingertips.

10 THE COURT: Well, you're making a lot of
11 paper over nothing unless there's a rule that does it.
12 Somebody has got to know the answer to that.

13 MR. ROBERTSON: I'll look into it, Your
14 Honor. We'll tell you on the video that you played
15 said the examiner can look at the prior art references
16 and the references discussed in the background of the
17 invention.

18 THE COURT: It's in the video. I know.
19 That's why I'm asking the question, for Pete's sake.
20 It's confusing to the jury to be doing what you're
21 doing. That's why I'm concerned about this. So the
22 way you're asking these questions suggests that it's
23 required when in fact they have already been told that
24 it isn't.

25 And if that reference is wrong, then I need

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1 to know it and straighten it out, but I don't think it
2 is wrong.

3 MR. ROBERTSON: We did give you the case law
4 for a supplemental instruction on what incorporated by
5 reference means.

6 THE COURT: That's different.

7 MR. ROBERTSON: When it's incorporated by
8 reference, it's all -- the entire patent is fully
9 disclosed therein. It's as if it's part and parcel of
10 the whole patent.

11 THE COURT: That's correct unless there is a
12 rule that says to be considered prior art, it has to
13 be in the -- is it cited references?

14 MR. ROBERTSON: Yes, sir.

15 MR. McDONALD: References cited.

16 THE COURT: References cited. And I don't
17 think it is.

18 MR. ROBERTSON: I don't think so either.

19 THE COURT: I don't think it is, which is why
20 I don't think it's the rule.

21 MR. McDONALD: I did want to show in this
22 section --

23 THE COURT: You can do it, but change your
24 question so you don't do this. Don't cause that
25 problem. You can ask a question without -- and I

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1 don't want him saying another thing about has it been
2 disclosed as prior art.

3 MR. ROBERTSON: We're going into a different
4 section. It has nothing to do with --

5 THE COURT: What does it have to do with?

6 MR. McDONALD: Well, the RIMS patent
7 application clearly disclosed --

8 THE WITNESS: Put that back up. Okay. I've
9 got what I want. I can't make any sense out of this
10 because I don't have the whole text.

11 MR. McDONALD: I'll just move on.

12 THE COURT: Okay.

13 BY MR. McDONALD:

14 Q Dr. Shamos, you were shown a part of the file
15 history that showed that the original application, the
16 RIMS application, was described as an application
17 about a patent number, correct?

18 A Yes.

19 Q When the patents in this suit were filed, was that
20 disclosure of the RIMS patent application that was not
21 in the issued patent, was that something that you
22 considered to be prior art at that point in time?

23 MR. ROBERTSON: I'm going to object, Your
24 Honor.

25 THE COURT: The question is whether he

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1 considered it. And the answer is yes or no.

2 In forming your opinion, did you consider
3 the prior art or not?

4 BY MR. McDONALD:

5 Q At that point in time on the filing date of the
6 patents.

7 A I'm not sure that I understand the question.

8 THE COURT: Okay. Then let him rephrase it.

9 BY MR. McDONALD:

10 Q When is it that the RIMS patent became prior art?

11 MR. ROBERTSON: That's actually calling for a
12 legal conclusion.

13 THE COURT: Yes, it is.

14 Q Did you have an understanding, Dr. Shamos, from
15 your standpoint as to when that RIMS patent would have
16 become prior art?

17 THE COURT: Start all over again. Did you
18 consider when you were making your analysis that, as
19 of the date of the patent at issue, did you consider
20 the RIMS patent as prior art? Is that what you asked
21 him?

22 MR. McDONALD: I think the question is when
23 did it become prior art?

24 THE COURT: What?

25 MR. McDONALD: My question is what is his

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1 understanding as to when the RIMS patent became prior
2 art.

3 THE COURT: No. The question is whether he
4 considered it as prior art. That's where you started
5 out. Did you consider as prior art the RIMS patent,
6 '989, right?

7 BY MR. McDONALD:

8 Q Okay, we can start there.

9 A For purposes of forming my opinions on validity, I
10 considered the '989 patent to be prior art.

11 Q And that patent issued in January of '98, right?

12 A Yes.

13 Q How long after the patents were filed did that
14 issue approximately?

15 MR. ROBERTSON: Your Honor, I didn't go into
16 any inquiry about this.

17 THE COURT: Actually, you did.

18 MR. ROBERTSON: As to the date --

19 THE COURT: It's obvious between the date of
20 the application and the date of the issuance. It's
21 right on the face of the patent. And I think you did
22 ask him about it.

23 Are you asking him what's the difference
24 between the dates?

25 It was filed when? Do you remember. It's on

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1 the face of the patent.

2 THE WITNESS: It was filed in 1993. I'm
3 sorry. 1994.

4 BY MR. McDONALD:

5 Q So let's talk a little bit about the J-CON and
6 P.O. Writer prior art that Mr. Robertson asked you
7 about.

8 MR. ROBERTSON: I object, Your Honor,
9 referencing this prior art.

10 THE COURT: He didn't testify about it. In
11 fact, he said he didn't. So you can't ask him about
12 that.

13 MR. McDONALD: He was asked about it in his
14 cross-examination.

15 THE COURT: But the fact that he was -- I
16 don't think that I would have asked that question, but
17 that didn't open the door to a whole new set of
18 testimony on that topic. All he did is say he asked
19 him whether he gave the opinion or not. And he said,
20 No, I didn't. And that's the end of it because you
21 don't need to go into it unless you think that he did
22 give an opinion, and that that answer was wrong by
23 Dr. Shamos, and you need to correct it. And he didn't
24 give the opinion. So you don't need to correct
25 anything. So let's move on.

1 and the instructions and deliberate and decide on the basic
2 issues of patent infringement and patent validity. Once you
3 return the verdict on those, then the rest of what happens, if
4 anything, is for the Court to decide. Is that satisfactory;
5 counsel?

6 MR. ROBERTSON: Yes. Thank you, Your Honor.

7 THE COURT: All right, Mr. Strapp, are you taking
8 over now?

9 MR. STRAPP: Yes. Your Honor, ePlus calls as its
10 next witness Mr. Ken Farber.

11

12 **KENNETH FARBER,**

13 a witness, called by the plaintiff, having been first duly
14 sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. STRAPP:

17 Q Could you please state your name again for the record.

18 A Kenneth Farber.

19 Q And just to refresh everyone's memories, can you please
20 describe your present employment.

21 A Sure. I'm the president of ePlus Systems and content
22 services.

23 Q How long have you been in that position?

24 A Ten years.

25 Q Mr. Farber, last time you were on the stand, you offered

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1 some testimony about the ePlus/Ariba license agreement; do you
2 recall that?

3 A Yes.

4 Q Has ePlus ever licensed the three patents that are at
5 issue in this case to any other companies?

6 A Yes.

7 Q What other companies has ePlus licensed the patents to?

8 A We've licensed the patents to companies such as SAP,
9 SciQuest, Verian, Perfect Commerce.

10 Q And approximately how much revenue has ePlus received for
11 licensing the three patents that are in suit in this case?

12 A Close to 58 million.

13 Q Do you see in front of you, Mr. Farber, is that a complete
14 list of the licensees for ePlus's patents-in-suit?

15 A Yes, it is.

16 Q Has ePlus ever licensed the patents-in-suit to anyone else
17 besides these five companies?

18 A There was a patent license granted to a company called
19 ProcureNet which is the company -- or piece of the company that
20 ePlus had acquired.

21 Q And that was back in what time frame?

22 A It was around the acquisition, about ten years or so ago.

23 Q Would you consider each of the five companies listed here,
24 Ariba, SAP, Perfect Commerce, Verian, and SciQuest to be
25 competitors of ePlus?

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1 A Yes. They are direct competitors.

2 Q And competitors in the e-procurement software industry?

3 A That's correct.

4 Q What about ProcureNet, are they a competitor of ePlus?

5 A No, ProcureNet is not a competitor.

6 Q Listed here you have the five license agreements for the
7 companies ePlus considers as competitors to the e-procurement
8 software industry?

9 A That's correct.

10 Q Are you personally familiar with license agreements, the
11 five license agreements that you've described?

12 A I am.

13 Q How do you have any familiarity with these agreements?

14 A I was directly responsible and involved in the negotiation
15 and the finalization of these agreements.

16 Q For each five of the agreements?

17 A Correct.

18 Q Mr. Farber, you have a notebook in front of you. Could
19 you please turn to Plaintiff's Exhibit 43.

20 A Okay.

21 Q Do you recognize the document in front of you?

22 A Yes.

23 Q What is this document here?

24 A This is the license and settlement agreement between Ariba
25 and ePlus.

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1 MR. STRAPP: Can you blow up the first paragraph
2 there, please.

3 Q When was this particular agreement entered into between
4 ePlus and Ariba?

5 A February 12th, 2005.

6 Q Mr. Farber, can you turn, please, to section F of the
7 agreement. That's on page four of the license, bottom of the
8 page, paragraph 11. It's got the Bates number on the bottom
9 right 600.

10 A 600?

11 Q It's up on your screen as well.

12 THE COURT: May I see counsel for just a minute.

13

14 (Discussion at sidebar as follows:)

15

16 THE COURT: I'm a little bit confused about using
17 these exhibits. Mr. McDonald, do you want the exhibits in?

18 MR. McDONALD: We had opposed their admission at one
19 point, Your Honor, but you said they could come in. We would
20 stipulate to what he's already testified about the cumulative
21 numbers. I think he could probably get through it without
22 having to go through these things.

23 THE COURT: Why do we need to have the documents in
24 if they'll agree to the amounts?

25 MR. STRAPP: I wanted to show that each one of the

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1 licenses were for the same three patents that are in suit in
2 this case and that each of these companies are the competitors.
3 I mean, maybe I can do that without showing the documents.

4 MR. McDONALD: I've seen them all. They all are the
5 three patents-in-suit.

6 THE COURT: I'm sure if he knows that, he'll testify
7 to it. Then we don't have to get into any discussion of that.

8 MR. McDONALD: That would certainly be what we'd
9 appreciate, Your Honor.

10 MR. STRAPP: All right, so we'll do it without
11 showing them the documents.

12 THE COURT: Then we don't have to get into -- the
13 reason I ask this is because if you want to show that they were
14 the product of settlements, I need to give the jury some
15 instructions about it.

16 In other words, if you want to discount their
17 effectiveness by examining on -- that they came out of
18 litigation, there are different lawyers that approach that
19 issue differently about whether they want to get into that or
20 not. Certainly you can get into it, and you can have the
21 exhibits in in that event, but if you're not going to approach
22 it that way --

23 MR. McDONALD: Well, I think he's already identified
24 them as settlement and license agreements. That's what they're
25 all called, and if he just has him establish that they are in

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1 settlements of litigation, I don't know that --

2 THE COURT: That's sufficient for you?

3 MR. McDONALD: Yeah.

4 THE COURT: Then let's do it that way, and don't use
5 the documents.

6

7 (End of sidebar discussion.)

8

9 Q Mr. Farber, we were talking about the ePlus/Ariba license
10 agreement. Can you tell me specifically what was exchanged or
11 what was licensed as part of that agreement between ePlus and
12 Ariba? Let's start first with Ariba. What did Ariba license,
13 if anything, to ePlus as part of that agreement?

14 A What Ariba licensed to ePlus is the ability for ePlus to
15 utilize its patents.

16 Q So Ariba licensed its own patents to ePlus as part of this
17 license agreement?

18 A That's correct.

19 THE COURT: When you say its patents, you mean the
20 right to use Ariba's patents?

21 THE WITNESS: That's correct.

22 THE COURT: All right, go ahead.

23 Q What did ePlus license to Ariba?

24 A Conversely, we had provided the rights for Ariba to
25 utilize our patents.

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1 THE COURT: The patents-in-suit?

2 THE WITNESS: Correct, the patents-in-suit.

3 Q That is the '683, the '172, and '516 patents?

4 A Correct, the same ones we're talking about.

5 Q Did Ariba agree to pay any amount of money for this
6 license agreement?

7 A Yes.

8 Q How much was that?

9 A I believe it was -- let me go to that, refresh my memory
10 exactly, but it was 37 million.

11 Q \$37 million?

12 A Correct.

13 Q So in sum then, Ariba granted a license to ePlus for its
14 patents, paid ePlus \$37 million, and in exchange, ePlus
15 licensed the three patents that are in suit in this case; is
16 that correct?

17 A That's correct.

18 Q Now, you had mentioned there were four other license
19 agreements that ePlus has entered into with its competitors.
20 What was the next one in time after Ariba? What was the next
21 license that ePlus granted?

22 A The next one would be SAP.

23 Q And do you recall approximately what time frame that was?

24 A Let me try to find an agreement.

25 Q In your binder, it's at Plaintiff's Exhibit 318.

Farber - Direct

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1 A Okay. It was -- looks like it was finalized
2 December 11th, 2006.

3 Q Who is SAP?

4 A SAP is a large company that some of the products that they
5 offer competed with our solutions.

6 Q And I didn't get a chance to ask you, but who is Ariba?

7 A Same. Ariba was a large company that competed with ePlus
8 in the market.

9 Q Can you describe for me what was licensed as part of the
10 ePlus/SAP license agreement?

11 A We had provided, in a similar fashion as we had done for
12 Ariba, we provided them the ability to utilize the three
13 patents that are in suit here. We granted them a license to
14 utilize those patents.

15 Q And what did SAP give to ePlus in exchange for a right to
16 use the three patents that are in suit in this case?

17 A I have to just refresh my memory if they had
18 cross-granted --

19 Q Let me direct your attention to section four of the
20 agreement.

21 A Okay.

22 Q 4.1?

23 A Yeah, what this is is that in exchange for the grant by
24 ePlus to the three patents-in-suit, SAP paid ePlus 17 and a
25 half million dollars.

Farber - Direct

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1 Q \$17.5 million?

2 A That's correct.

3 Q We've talked about the Ariba and SAP license agreements.

4 I think you mentioned that there were three additional
5 agreements. Can you just refresh my memory what those three
6 agreements are?

7 A Sure. There was Verian, it was Perfect Commerce, and
8 SciQuest.

9 Q Let's start with Perfect Commerce. If you could turn to
10 Plaintiff's Exhibit 317 in your binder.

11 A Okay.

12 Q When did ePlus enter into a license agreement with Perfect
13 Commerce?

14 A That would be August 28, 2009.

15 Q Who is Perfect Commerce?

16 A Perfect Commerce is a company that competes with ePlus.

17 Q And, again, can you describe for us what the subject
18 matter was that was licensed as part of this ePlus/Perfect
19 Commerce license agreement?

20 A Specifically associated with the three patents that are in
21 suit here.

22 Q ePlus licensed the three patents-in-suit to Perfect
23 Commerce?

24 A That's correct.

25 Q So that Perfect Commerce could use, sell, make, or offer

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1 products that incorporated the technology in those three
2 patents?

3 A Yes, that's correct.

4 Q And how much money, if any, did Perfect Commerce pay for
5 the right to have a license to the ePlus patents?

6 A Let me just make sure.

7 Q Let me direct your attention to Exhibit A to the Perfect
8 Commerce --

9 A I have it.

10 Q -- agreement.

11 A In exchange for the patents, they paid \$750,000.

12 Q Well, as the negotiator for ePlus, why was ePlus willing
13 to accept \$750,000 from Perfect Commerce if ePlus -- if SAP and
14 Ariba had agreed to pay millions of dollars more?

15 MR. McDONALD: I object to this, Your Honor. We
16 tried getting into the details, but there was claims of
17 privilege, so we weren't able to inquire into all the whys and
18 wherefores of these settlements. I don't think it's
19 appropriate to go into them now, and also cumulative.

20 THE COURT: It isn't cumulative, I don't think, but
21 if in fact you claimed a privilege and foreclosed their inquiry
22 in depositions, then you can't inquire into it because that's
23 not been allowed.

24 MR. STRAPP: Your Honor, I was not present when
25 privilege was claimed --

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1 THE COURT: You read the deposition, I take it, in
2 preparation.

3 MR. STRAPP: I did read that deposition, and I
4 believe that we didn't make a claim of privilege with
5 respect to --

6 THE COURT: You did?

7 MR. STRAPP: We did not with respect to this
8 particular agreement.

9 THE COURT: Mr. McDonald.

10 MR. McDONALD: I'm looking for it.

11 THE COURT: If they did, if you did, your objection
12 is well-taken. If they did not, your objection is not
13 well-taken.

14 MR. McDONALD: What we're able to find at this point,
15 Your Honor, is at pages 416 to 417 of Mr. Farber's testimony
16 regarding the SAP agreement, he was asked, how did you come up
17 with a settlement number in the case, and his answer was, I
18 used my counsel to determine what they thought was fair, et
19 cetera, and then we got into some privilege issues there.

20 THE COURT: This relates to the Perfect Commerce
21 agreement. They did the same thing. No?

22 MR. McDONALD: Nothing specific to Perfect Commerce,
23 Your Honor.

24 THE COURT: All right. Objection overruled.

25 Q Mr. Farber, let me ask you that question again. Why was

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1 it that ePlus agreed to license the patents to Perfect Commerce
2 for \$750,000 if Ariba had paid 37 million and SAP had paid 17
3 and a half million for the patents?

4 A Well, I mean, quite simply --

5 MR. McDONALD: I object, Your Honor, because I think
6 he worked SAP into that question, and that is the one we were
7 able to find --

8 MR. STRAPP: Your Honor, I'm asking about Perfect
9 Commerce and why ePlus, the --

10 THE COURT: Why don't you reframe your question.

11 MR. STRAPP: Sure.

12 Q Mr. Farber, why was it that ePlus accepted \$750,000 for a
13 license, to grant a license to Perfect Commerce if Ariba was
14 willing to pay \$37 million for a license?

15 A Well, they were a much, much smaller company for starters.
16 Secondly, we had the opportunity during the negotiation to
17 actually physically go to their location and audit their
18 financials, and, you know, we had some significant concerns of
19 them being a going concern, that they would actually stay in
20 business over time, and we came to an amicable agreement, you
21 know, and considered this to be a fair settlement agreement
22 based upon what their situation was at the time as a business.

23 Q And Perfect Commerce, again, that was a company that
24 competed in the e-procurement software industry?

25 A That's correct.

Farber - Direct

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1 Q I think you mentioned that ePlus also granted a license to
2 SciQuest; is that right?

3 A That is correct.

4 Q Can you turn to Plaintiff's Exhibit 319 in your notebook,
5 please.

6 A Okay.

7 Q When did ePlus enter into a license agreement with
8 SciQuest?

9 A That's August 19th of 2009.

10 Q And what was the subject matter that was granted by ePlus
11 to SciQuest as part of this license agreement?

12 A This, again, is the licensing of the three
13 patents-in-suit.

14 Q The three patents in this suit?

15 A Yes, the '683, the '516, and '172 patent.

16 Q And what, if anything, did SciQuest give to ePlus in
17 exchange for a license to the three patents, same patents that
18 are in suit in this case?

19 A Let me check here. In exchange for the licenses that were
20 granted by ePlus, SciQuest paid us \$2.4 million.

21 Q And the last, I think the last license you mentioned was
22 with a company called Verian; is that right?

23 A Yes, that's correct.

24 Q Who is Verian?

25 A Verian was also and also is a competitor of ePlus in the

Farber - Direct

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1 market.

2 Q And let's just take a look quickly at that license
3 agreement. That's at Plaintiff's Exhibit 320?

4 A Yes.

5 Q When did ePlus enter into a license agreement with Verian?

6 A July 7th, 2009.

7 Q What did ePlus grant to Verian as part of this license
8 agreement?

9 A The same as the other licenses. We granted the three
10 patents that have been in suit here.

11 Q And can you tell me what, if anything, Verian agreed to
12 pay ePlus for a right to use the patented technology?

13 A Sure. They had an initial payment of \$500,000.

14 Q Was there any other arrangement between the two companies
15 for their licenses?

16 A Yeah. We had settled on -- they were also a small
17 company, similarly to Perfect, but we saw them more as an
18 ongoing concern, and we agreed to associate a royalty so that
19 when they exceeded \$15 million within a calendar year, that we
20 would receive two and a half percent of those revenues.

21 Q What was the reason that you felt like that was a fair and
22 reasonable license arrangement with Verian, this royalty
23 provision?

24 A Why did we think it was fair?

25 Q Yeah.

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1 A Well, I think it was fair to both parties. I mean, we
2 weren't necessarily looking to, you know, press a thumb on them
3 and put them out of business. You know, we did see them as
4 staying in business.

5 They didn't have the funds to pay what we thought, you
6 know, the patents were worth at that time, but, you know, we
7 gave them an opportunity. As they grew, then, you know, there
8 was a percentage associated as a royalty to the patents.

9 Q Mr. Farber, has there been any recognition in the supply
10 chain industry for the products that ePlus sells that
11 incorporated the patented technology?

12 A Yes. Yes.

13 Q What kind of recognition?

14 A There's been industry awards, industry reports.

15 Q And have you or your customers been recognized for any
16 specific benefits or specific recognition for the Procure+ or
17 Content+ products?

18 A Yeah. Well, one of our clients recently was just awarded
19 what's called Pros to Know which is a supply chain. We
20 actually nominated one of our clients --

21 THE COURT: What's it called, sir?

22 THE WITNESS: Supply chain.

23 THE COURT: No.

24 THE WITNESS: Oh, pros, as in professionals, to know.

25 THE COURT: Right, t-o, and then k-n-o-w.

Farber - Cross

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1 and this was the way he was going to get into it, I understood.

2 THE WITNESS: Okay. Repeat the question, I'm sorry.

3 Q Mr. Farber, isn't it true that all the licenses you've
4 talked about were involving companies ePlus had sued; is that
5 right?

6 A Yes, that's correct.

7 Q And all of those agreements were settlements of those
8 lawsuits; correct?

9 A Correct.

10 Q So the parties hadn't finalized -- there was no final
11 decisions in those cases; correct?

12 A I don't understand what you mean.

13 MR. McDONALD: I'll withdraw the question.

14 THE COURT: Let's don't get into that. I'm going to
15 tell the jury about -- I think that's getting further than you
16 need to get.

17 Q EPlus has dozens and dozens of competitors in the software
18 procurement area; right?

19 A We have competitors, sure.

20 THE COURT: The question he's getting at is how many.
21 Why don't you try again, and you ask him if he knows how many
22 competitors he has in that area.

23 Q Isn't it true that you have dozens and dozens of
24 competitors, Mr. Farber, in the software procurement area?

25 A I don't know if it's dozens and dozens, but I think it's

Farber - Redirect

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1 Q And did that \$12,000 valuation turn out to be accurate?

2 A No.

3 Q How so?

4 A Well, there were a number of things -- let me try to
5 explain it this way: Well, first of all, if it was valued at
6 \$12,000, we obviously were able to license almost \$60 million
7 worth of the patents. So somebody, you know, really estimated
8 incorrectly. So I think ePlus made a very good assessment of
9 its own value in the acquisition, but --

10 Q Let me ask you this: Do you have any knowledge about how
11 that valuation was actually done?

12 A I do.

13 Q How do you know how this valuation was done?

14 A When I spoke to the principals that were involved in the
15 valuation on both sides --

16 MR. McDONALD: Your Honor, this is outside the scope.
17 He didn't get into these things.

18 THE COURT: In fact, he was kept from going into it
19 because he said he wasn't involved in it, and in addition to
20 that, his answer is hearsay.

21 MR. STRAPP: Your Honor, he was asked about whether
22 or not --

23 THE COURT: Hearsay. Who was asked what. Doesn't
24 count in dealing with hearsay.

25 MR. STRAPP: We're not offering it for the truth of

Farber - Redirect

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1 the matter of whether or not it was a \$12,000 valuation was
2 accurate.

3 THE COURT: What's the non-hearsay purpose?

4 MR. STRAPP: The process involved in coming up with
5 the valuation.

6 MR. McDONALD: He knows the process because somebody
7 told him, so it's still hearsay.

8 THE COURT: But if he's offering it for a non-hearsay
9 purpose, then the non-hearsay purpose has to be relevant and
10 has to be judged by Rule 403 as well. Why is it relevant?

11 MR. STRAPP: It's relevant because it shows why the
12 number \$12,000 was come up with.

13 THE COURT: That's for the truth of the matter.
14 Thank you. That's what I thought it was relevant for. All
15 right. Let's move right on. Objection sustained.

16 Q Mr. Farber, you mentioned that the valuation turned out to
17 be inaccurate in the sense that you received almost \$60 million
18 in license revenue. Was it inaccurate in any other way besides
19 that?

20 A I'm not sure I understand.

21 Q Has the patents brought any other value beyond the
22 \$60 million to ePlus?

23 MR. McDONALD: Objection, beyond the scope, Your
24 Honor.

25 THE COURT: Overruled.

Hilliard - Direct

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1 legal principles that govern your analyses?

2 A Yes, I was.

3 Q Did you have an opportunity to personally review and use
4 any of the alleged prior art systems?

5 A Well, I have had that experience with the PO Writer system
6 during the SAP trial. SAP was able to produce a copy of that
7 software, and I was able to experiment with it, exercise it,
8 and determine how it functioned. I did so prior to that trial,
9 and I also did so in court during that trial.

10 Q Did you review file listings relating to the computer code
11 for that system?

12 A I did.

13 Q And do you recall any relevant information about the dates
14 that were included in those file listings?

15 A Yes. The dates included both dates preceding and dates
16 following August of 1994.

17 MR. McDONALD: I'll object, Your Honor, as irrelevant
18 and confusing. We haven't proffered any, and he's talking
19 about dates of things that weren't in evidence in this case.

20 MS. ALBERT: I'll move on.

21 THE COURT: I think he's just relating what he did
22 and his familiarity with the systems at issue.

23 Q Did you have the opportunity to review the validity report
24 submitted by ePlus's other technical expert, Dr. Alfred Weaver?

25 A Yes, I did.

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1 perhaps I should ask you, what is your understanding of a
2 computer software system that is modular?

3 A Having worked in the computer industry for computer
4 vendors before going out on my own as a consultant, companies I
5 worked for produced modular systems, and by that we meant they
6 were systems that were sold in pieces. Customers didn't have
7 to buy every single module. There typically might be a
8 required module and optional modules.

9 Q So suppose a prior art system was modular. Is that
10 relevant to the issues that the jury needs to consider?

11 A I believe.

12 MR. McDONALD: Objection, Your Honor. I don't think
13 he's in a position to tell the jury what's relevant here. Plus
14 modular is not even part of the claims. I think it's
15 irrelevant.

16 THE COURT: I think the focus here is what's the
17 reason for his -- what is his opinion and what is the reason
18 for it, not what's relevant for the jury. I'm not going to let
19 in irrelevant evidence, but he shouldn't be commenting upon it.
20 Let's frame the question another way, please.

21 MS. ALBERT: Thank you, Your Honor.

22 THE COURT: Sustained.

23 MS. ALBERT: I will move on.

24 Q With respect to the PO Writer system, did you seek
25 contemporaneous documents that supported each of the assertions

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1 that Lawson has made with respect to the features and
2 functionalities that that system allegedly had?

3 A No, I did not. No such documents were produced by the
4 inventor or the developer of the system, and no such documents
5 were produced by Lawson.

6 THE COURT: Are you talking about in August of 1984?
7 1994?

8 THE WITNESS: I'm sorry, Your Honor. What was it?

9 THE COURT: Are you talking about the functionality
10 and features as they existed in August of 1994?

11 THE WITNESS: Yes. Yes, Your Honor, that's what -- I
12 saw no evidence of what the functions and features were at that
13 time, or for that matter, any time.

14 THE COURT: You didn't see any contemporary
15 documentation that supported what the features or functionality
16 were of the PO Writer in August of 1984 -- '94?

17 THE WITNESS: I saw some contemporaneous
18 documentation of some features and functions, but I did not see
19 complete contemporaneous documentation of all of the features
20 and functions that it's my understanding are part of the
21 contention that that system anticipates the patents-in-suit.

22 Q Did you review the PO Writer guided tour manual?

23 A I did.

24 Q Now, were these PO Writer documents that you referenced
25 publicly available?

Hilliard - Direct

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1 A No, they were not.

2 Q Did you see any pre-1994 documentation relating to a
3 license by any company to a PO Writer system having all of the
4 alleged features and modules that Lawson relies upon for its
5 contentions?

6 A I didn't see any of that, no, and it's my understanding
7 that Mrs. McEneny was asked if she had that, and she said she
8 didn't in her deposition.

9 Q Did you see any pre-1994 documentation relating to a
10 license by any company to a RIMS system having all of the
11 alleged features that Lawson contends existed at that time?

12 A No.

13 Q Did Lawson produce any documentation to corroborate that
14 the TV/2 search program, having all of the alleged features
15 that it relies upon, was ever licensed to anyone prior to IBM's
16 contract with Fisher Scientific relating to the patented
17 electronic sourcing system?

18 A I saw no such document, no such corroboration.

19 Q Now, turning to the patents-in-suit, Mr. Hilliard, do you
20 have an opinion as to what the problem was that the inventors
21 were trying to solve in those patents based upon your review of
22 the patent specification and the patent claims?

23 A Yes, I do.

24 Q Can you describe your understanding.

25 A Yes. The patents-in-suit solve a problem that's been, to

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1 so general, maybe, I don't know that it's helpful. Why don't
2 you try to get more specific.

3 Q In your opinion, did the PO Writer system satisfy the
4 needs that were recognized by the inventors in their patents?

5 MR. McDONALD: Same objection, Your Honor. I think
6 we need to tie it to the claims.

7 MS. ALBERT: I'll rephrase.

8 Q Mr. Hilliard, do you have an opinion as to whether or not
9 the PO Writer system satisfied the needs or the requirements of
10 the ePlus patent claims?

11 A Yes, I do have an opinion of that.

12 Q What is your opinion?

13 A Even if it did operate as described in the documents, even
14 under those circumstances, and there's no corroboration that it
15 did, but even if that were the case, it wouldn't satisfy the
16 claims.

17 Q What were some of your reasons why it doesn't satisfy the
18 claims?

19 A Primarily the PO Writer is a system that allows users to
20 review catalogs, but the items in the catalogs are not
21 associated with vendors, and that's one of the key elements of
22 almost every single claim in that the patents-in-suit, the
23 claims of the patents-in-suit all call for the buyer to be able
24 to look for items and to select items to create requisitions
25 where the items in the requisitions are associated with the

Hilliard - Direct

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1 vendors from whom that buyer wants to purchase, and then to
2 turn those requisitions into one or more purchase orders where
3 the items on the purchase order -- and you only send one
4 purchase order to each vendor. You wouldn't send a purchase
5 order to a vendor that doesn't sell the item or from whom you
6 don't want to buy the items. So where the purchase orders pick
7 up the association of vendors from the requisition and
8 translate that into the purchase order.

9 The PO Writer system is simply a form-filling system.
10 It's designed for the purchasing agent, someone in the
11 purchasing department of the company to make the determination
12 of who the vendor or supplier will be, not the buyer, not the
13 one who specifies. So at every step along the way in that
14 system, even if the buyer indicates a preferred vendor, or even
15 if the item comes out of a catalog selected by the buyer and
16 that catalog is associated with a vendor, by the time that item
17 gets into the requisition, the vendor association is lost.

18 The purchasing agent has to reenter the vendor, and then
19 once again, once the requisition is completed, it's the
20 purchasing agent, not the requisition, that determines what
21 supplier the purchase order goes to. So it doesn't satisfy
22 almost all of the claims because it loses that connection
23 between the selection of the buyer who wanted to pick out
24 vendors that he knows and is comfortable with and the ultimate
25 purchase.

HILLIARD - DIRECT

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1 your opinions?

2 A Well, I considered the fact that it was considered
3 to be an innovative invention by the industry. There
4 was an industry research and evaluation group known as
5 the Aberdeen Group that ranked it very high. And then
6 the Internet and Electronic Commerce Conference, which
7 is an industry organization that provides awards, gave
8 it an award shortly after it was developed as a
9 Supplylink or Cornerstone product, that it was above
10 the capabilities of comparable -- of other systems
11 that attempt to do the same thing. And also it's been
12 licensed by other vendors.

13 So all of those put together are really sort of
14 additional indications that it's an innovative
15 invention.

16 MS. ALBERT: Thank you, Mr. Hilliard. I have
17 no furthest questions.

18 THE COURT: I think Mr. McDonald may have
19 more than five mints or so. So I think it will be a
20 good time to take the afternoon recess.

21 Just take your books with you if you would,
22 please.

23 (The jury is exiting the courtroom.)

24 THE COURT: How long do you think you're
25 going to take?

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC.

vs.

LAWSON SOFTWARE, INC.

:
: Civil Action No.
: 3:09CV620
:
:
: January 21, 2011
:

COMPLETE TRANSCRIPT OF THE JURY TRIAL
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE, AND A JURY

APPEARANCES:

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1 only worked 18. Come one. Let's go.

2 Go get me if law and I'll look at it.

3 MR. ROBERTSON: I simply observed, Your
4 Honor, the MPEP sections that you have that they have
5 provided you and we provided you come from the same
6 edition. The 1998 version. So that section says that
7 they read the application, and if it has the prior
8 art, they must consider it. That's from the same MPEP
9 that Mr. Schultz is relying on.

10 THE COURT: And it seems to me that the basic
11 rule is you read these things together so that they
12 make sense, and one provision doesn't gut the other
13 provision, and that's a standard rule of
14 interpretation that is generally to be followed. And
15 the other thing is the rule of reason.

16 I just don't believe that just to make the
17 job easier for a patent examiner, they clearly
18 disclosed information that is clearly considered by a
19 patent examiner can't be taken into account in
20 assessing things. That would make the Patent Office
21 exercise almost absurd. And we can't construe
22 regulations as absurd. We just can't do that.

23 MR. McDONALD: Your Honor, I'd also note for
24 the record, I know the reexams aren't before the jury,
25 but the Patent Office on reexam for each of the three

1 patents specifically said that this '989 patent
2 presented a substantial new question of patentability
3 because it wasn't a fact not considered.

4 I do think it's very unfair to do anything
5 that would portray to the jury that the Patent Office
6 must have considered it. I know the reexam isn't
7 coming in, but when it's actually directly contrary to
8 the Patent Office's findings, and we agreed back at
9 the motions in limine, I just think that would be very
10 unfair.

11 THE COURT: You know, you can deal with the
12 reexamination procedure in whatever way you want to in
13 the instructions, but that's not before me now.

14 MS. HUGHEY: Your Honor, I don't want to beat
15 a dead horse, but can I have one moment to wrap up
16 before we close this?

17 MS. STOLL-DeBELL: I have one short thing.

18 The 102(e) issue that Ms. Albert raised with
19 that *Riverwood* case, I wanted to explain -- and I
20 actually -- I want to explain what's going on with
21 that, Your Honor.

22 Each claim may have different inventors. And
23 so you have the inventors on a patent, and it would be
24 all the inventors that may apply to all the claims.
25 But you do look at inventorship on a claim by claim

1 questioned about it, but the definition I gave did not have as
2 disclosed in it, and that's what the jury has been told. So I
3 think the correct instruction is as edited in Lawson's 20.

4 MR. ROBERTSON: Well, Your Honor, I guess our concern
5 is, I mean, we received that from --

6 THE COURT: You got that. I don't know how you got
7 it, but you didn't get it from me.

8 MR. ROBERTSON: Well, not directly, sir.

9 THE COURT: Well, you did get it. What you did is --
10 it is my words, but it was my words before I finished the
11 instruction. It was articulated at the beginning. We then had
12 discussion, and as a consequence of the discussion, I took out
13 as disclosed basically because all of the definitions that
14 anybody provided me just has made known, and I don't, frankly,
15 think there's any difference with it out.

16 MR. ROBERTSON: Your Honor, could I just -- I won't
17 quibble with that. Let me just make this for the record then,
18 if I could, sir, and that is, we did cross-examine witnesses on
19 it, and I did ask questions that utilized this language and did
20 get what I thought were favorable answers with respect to it.

21 Now if it's coming out, I don't think the jury is
22 going to have a specific memory of that, but I don't want to
23 hear -- I'd appreciate not hearing an argument made that
24 somehow the questions that were asked would not apply to this.

25 THE COURT: They don't, because has made known and

1 has disclosed is the same thing. It's redundant.

2 MR. MERRITT: Your Honor, for the clarity of the
3 record, this may be where some of the confusion comes from. At
4 page 1523 of the trial transcript, the Court was reading from
5 that piece of paper, and in that iteration, the transcript says
6 that the Court did use the term disclosed in talking to the
7 jury. So that may be where some of our confusion is coming
8 from.

9 THE COURT: I did use it to the jury?

10 MR. MERRITT: Yes, sir, you did. It was during the
11 Christopherson direct, and it's at page 1523.

12 THE COURT: Read what's before that.

13 MR. MERRITT: This is during an exchange with Ms.
14 Stoll-DeBell, and then the Court says, beginning at line three,
15 he was asked a different question. I'm going to tell the jury
16 what the definition is --

17 THE COURT: That's where I did it.

18 MR. MERRITT: That's enough.

19 THE COURT: What I did was take it out in the typed
20 form and left it in in the question if that's what the
21 transcript shows. Then that's what -- that's the one the jury
22 was told about, and that ought to stay in then.

23 MR. MERRITT: Beginning at line seven, just to
24 confirm --

25 THE COURT: The reason I asked you to read what went

1 before is I know what triggered the issuance of the instruction
2 at that particular time. It was made necessary by the
3 questioning, and so I decided that was the time to do it, and
4 if that's what the transcript shows, that -- it's obvious that
5 while I had edited out, or has disclosed, I did not edit it out
6 in telling the jury, and that's what the instruction should say
7 here. Shouldn't be different.

8 Frankly, I don't think there's a whit of difference
9 between has disclosed and made generally known, and the only
10 reason I took it out is because all of the other definitions,
11 one way or the other, sort of equate disclosing and made known,
12 and I saw no difference, and so I was just trying to make it
13 simple. But if that's what happened, then that's what
14 happened. That's the way it needs to stay, I think.

15 So your objection, if that's what you have still --
16 who is that, Mr. McDonald talking or -- who is going to talk?
17 Do you object now with that background or not given what I
18 actually did?

19 MR. McDONALD: What I recall is actually in the first
20 sentence, you also -- or the second sentence, you used to have
21 the language, or as disclosed, and you did remove it from that.
22 In this instruction, even as in the transcript here just read,
23 it just says, published simply means to make generally known
24 just as in instruction 20 in the second sentence.

25 I do have the remaining concern, though, that we have

1 this second reference to generally known that now has that
2 language on it. So we're --

3 THE COURT: I see what happened --

4 MR. McDONALD: -- talking about the same thing in two
5 different ways.

6 THE COURT: It is the same thing, and I did take it
7 out up there at the top, but I didn't take it out down in the
8 bottom in my edit. That's what happened.

9 MR. McDONALD: Exactly. My concern is --

10 THE COURT: What do you want me to do?

11 MR. McDONALD: Take it out the second time --

12 THE COURT: Not going to do it. Objection overruled
13 and preserved. I think I need to be consistent with what I've
14 already told the jury, particularly if I articulated it and you
15 all answered questions on it. Either I'm right or wrong that
16 -- I don't think as disclosed makes any difference. Then I
17 think you all are entitled to rely on what I the jury in open
18 court. If I did it wrong, then I'm sure you'll be able to get
19 the Federal Circuit to do something with it.

20 All right, 21. No objection to 21?

21 MR. ROBERTSON: No, sir.

22 THE COURT: 22.

23 MR. ROBERTSON: No objection.

24 THE COURT: Now, 23, Lawson has a suggestion
25 somewhere.

1 relying on this *SEB* case, Your Honor, which is an outlier case
2 talking about deliberate indifference. The facts of that case
3 are very different than what we are talking about here.

4 In that case, the defendant actually copied the
5 patentee's product. They sent it to their manufacturer, and
6 they copied every feature of it. Then they went and had a
7 patent infringement -- or an opinion done, and they didn't tell
8 the patent attorney that they had copied the patentee's
9 product.

10 And in that case, the Federal Circuit found that they
11 had acted with reckless disregard for the patent rights by
12 copying the product and then having a search done and not
13 telling their patent attorney that they copped it. In that
14 case, the Federal Circuit found that they basically did know
15 about the patent in that case because of those bad acts.

16 We don't have those facts here, Your Honor, and I
17 think this reckless disregard standard is confusing. As Mr.
18 Robertson noted, the Supreme Court has granted cert on that
19 case, and I just don't think it's good law, and I don't think
20 it makes sense to put it in this case.

21 MR. ROBERTSON: Your Honor, it is the Federal
22 Circuit's most recent pronouncement on this case. They didn't
23 announce the standard based on the facts. They announced the
24 standard can be reckless disregard, and I did raise this with
25 Your Honor before. A case that's on certiori is still the law

1 of the land until and -- if and until the Supreme Court
2 overturns it.

3 MS. STOLL-DeBELL: It is one case, Your Honor,
4 talking about --

5 THE COURT: Excuse me. Reckless disregard has always
6 been -- as far as I know, the concept of willful blindness,
7 deliberate indifference, all of those meld together and are
8 components that typically, in the law of intent, have been
9 considered -- have been appropriately considered as factors in
10 the analysis.

11 MS. STOLL-DeBELL: Your Honor, that may be true, but
12 it doesn't fit the facts of this case. We don't have any
13 copying here. In fact, as you know, Lawson has been selling
14 these products since the 1980s. There's just no facts that are
15 even anywhere close to the facts that they looked at in the *SEB*
16 case that would support instructing the jury on reckless
17 disregard here.

18 THE COURT: This case says, this Court has made
19 clear, however, that inducement requires a showing of specific
20 intent to encourage another's infringement. As other Courts
21 have observed, specific intent in the civil context is not so
22 narrow as to allow an accused wrongdoer to actively disregard a
23 known risk that an element of the offense exists.

24 And isn't that -- this Court notes that the Supreme
25 Court has indicated, in a different civil context, that

1 THE COURT: What?

2 MR. ROBERTSON: It's on the deliberate indifference
3 standard.

4 THE COURT: Well, that's somewhat different from
5 this, though. There is a relationship between deliberately
6 disregarding and deliberate indifference in the context of the
7 civil rights case. Indifference constitutes -- suggests
8 something different than disregard. So they are not exactly
9 the same, and I think the way the instruction is framed is
10 probably -- it certainly is consistent with the current state
11 of the Federal Circuit law, and I'm obligated to apply the
12 Federal Circuit law, not what I think the Court would do, the
13 Supreme Court is going to do.

14 Now that brings us to number -- let me ask you
15 something, Ms. Stoll-DeBell, while I'm thinking about it. Did
16 you file these so they are in the record?

17 MS. STOLL-DeBELL: Yes, sir.

18 THE COURT: I don't need to separately deal with
19 them?

20 MS. STOLL-DeBELL: Yes. So the next one, Your Honor
21 we reached an agreement on it.

22 THE COURT: You're going to give me shock. What is
23 it?

24 MS. STOLL-DeBELL: 27.

25 THE COURT: You all agreed to the added language?

1 MR. McDONALD: We do have an objection to a
2 part of that, and that's the part that would exclude
3 the lay testimony. We don't think the fact that we
4 proffered nonprivileged evidence on the issue should
5 --

6 THE COURT: This is the language that you
7 proposed. Oh, no. This came from ePlus.

8 MR. McDONALD: Our proposal was to focus on
9 the opinion of counsel issue and just have the jury
10 disregard the evidence relating to that issue, but
11 allow the testimony about the analysis apart from
12 counsel.

13 So we had proposed jury instruction No. 3
14 that says, "Lawson had no duty to get an opinion from
15 counsel on whether or not it infringes ePlus' patents.
16 Both parties in this case have received advice from
17 counsel without disclosing that advice to the other
18 party. This is normal. You may make no
19 determinations based on the fact that Lawson did not
20 disclose the opinion it received from its Lawson's to
21 ePlus. That fact has nothing to do with this case."

22 MR. ROBERTSON: Your Honor, we'd object to
23 that.

24 THE COURT: I'm not giving that. I'm going
25 to strike the part that says whether he or other lay

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1 witnesses at Lawson formed a viewpoint about whether
2 Lawson infringed the patents, and it will read, "The
3 other day Mr. Christopherson testified there was some
4 testimony about whether Lawson obtained an opinion of
5 non-infringement or invalidity of the patents. I
6 instruct you now I've excluded all that testimony and
7 I'm instructing you to disregard it."

8 MR. McDONALD: Our objection, Your Honor,
9 just to be clear, is that we do think the jury needs
10 to be clear that the fact that we didn't produce the
11 advice shouldn't be held against us in a sense.
12 That's what we think is missing.

13 MR. ROBERTSON: I think the instruction makes
14 that clear and is adequate.

15 THE COURT: I'll just add that has nothing do
16 with the case.

17 All right. And that will be inserted in
18 instruction number No. 13A.

19 Now, is there anything else I need to go over
20 here with the instructions?

21 MR. ROBERTSON: Well, Your Honor, we need to
22 get together and give you a summary of what the prior
23 art is going to be. I would anticipate we could do
24 something like Lawson contends that the prior art at
25 issue is X and ePlus contends the alleged prior art

1 THE COURT: 42, plaintiff's proposed
2 instruction, prior art considered by the examiner. I
3 understand your position that you think that it's not
4 even prior art. I disagree with that, and I think the
5 cases that were cited -- I think if you read the
6 manual as a whole, and what do you call it, the MPEP
7 as a whole, it is clear that the disclosure made in
8 this case in this patent can be considered as having
9 been considered as prior art on the facts of this
10 case, and the objection that you've made to striking
11 it -- I guess you made a request to strike it, didn't
12 you?

13 MR. SCHULTZ: Yes, sir, with respect to
14 instruction No. 42, I am.

15 THE COURT: I think that's the ruling in the
16 *Gould* case and the --

17 MR. ROBERTSON: *Eastman Kodak*?

18 THE COURT: *Polaroid v. Eastman Kodak*,
19 *Indiana Mills*, and the manual taken as a whole teach
20 that that's the applicable rule.

21 So now that being the case, what do we do
22 about instructing it? Why does it come up? Why does
23 it come up at all if nobody argues it?

24 Suppose I just say you can't make the
25 argument that it's not prior art or wasn't considered?

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1 Because there really isn't any evidence on that except
2 what appears in the file folder, and the guy actually
3 wrote something in the file folder about the matter.

4 So how do you propose that we deal with it
5 now we're at this point on the law, Mr. Schultz?

6 MR. SCHULTZ: We also submitted an
7 instruction on this matter, Your Honor, and it's in
8 our proposed instruction, the red line version you
9 have there.

10 THE COURT: Which one is it?

11 MR. SCHULTZ: Lawson proposed jury
12 instruction No. 1.

13 THE COURT: I don't have it.

14 MR. SCHULTZ: Your Honor, it's actually
15 No. 2.

16 THE COURT: I start with 8.

17 MR. SCHULTZ: It's at the back, Your Honor.

18 THE COURT: Oh, it's at the back. Excuse me.
19 Three.

20 MR. SCHULTZ: It's No. 2. So Lawson proposed
21 jury instruction No. 2.

22 THE COURT: Two. Okay. The face of any
23 patent issued by the United States Patent and
24 Trademark Office list of references that are cited to
25 the Patent and Trademark Office under the heading

1 "References cited." This list includes all the
2 references the examiner considered as prior art when
3 determining whether to grant a patent to the claimed
4 subject matter.

5 Okay. I can't give that given the ruling of
6 law that I've made. So what about the one that they
7 gave?

8 MR. SCHULTZ: Your Honor, I think Plaintiff's
9 Proposed Instruction No. 42 would be very highly
10 prejudicial to Lawson.

11 THE COURT: Let's get down to where the
12 rubber meets the road. Why are we going to have this
13 issue argued to the jury at all now? Why does that
14 even come in and, therefore, why do we need to
15 instruct, Mr. Robertson?

16 MR. ROBERTSON: If the defendant doesn't
17 argue it, I don't think we need an instruction. But
18 I've asked counsel --

19 THE COURT: Given the ruling of law that I've
20 made, how can you argue it?

21 MR. McDONALD: I guess given your ruling,
22 Your Honor, I understand we can't argue it. So if we
23 can't argue it, I don't see the need for that
24 instruction.

25 THE COURT: There's no need for an

1 instruction, do you agree?

2 MR. McDONALD: That's right. I understand
3 the ruling specific to the RIMS patent, the '989
4 patent. The RIMS brochure, for example, that wasn't
5 disclosed to the Patent Office. I assume we could
6 talk about that.

7 THE COURT: Absolutely.

8 MR. ROBERTSON: My colleagues reminded me
9 throughout the case --

10 THE COURT: But you can't do it by saying it
11 has to be in those lists.

12 MR. McDONALD: Okay.

13 THE COURT: Because that would then implicate
14 the effect of the '989 that was disclosed. You just
15 have to figure out a way to do it and say --

16 MR. McDONALD: That's not inconsistent with
17 your ruling.

18 THE COURT: Yes.

19 MR. McDONALD: I understand.

20 MR. ROBERTSON: Given Your Honor's ruling as
21 to what the state of the law is, we can certainly
22 argue that it was considered since it's cited
23 throughout the patent 59 times and listed as
24 incorporated by reference.

25 THE COURT: Why is that an issue?

1 MR. ROBERTSON: Because the presumption of
2 validity attaches there and also because --

3 THE COURT: Well, I'm going to tell them the
4 presumption -- let me tell you something. Don't be
5 outthinking owls now about whether or not -- because
6 could you open up a door that doesn't need to be
7 opened up. I think it's a neutral factor here in this
8 case.

9 MR. ROBERTSON: I think Dr. Shamos was asked
10 whether or not it was considered by the Patent Office.
11 So I think there's been testimony in the case that it
12 wasn't considered.

13 THE COURT: I think I said he couldn't
14 testify to that. Go back and check it because I do
15 remember that in cross-examination, I believe, of one
16 witness there was the file wrapper was an exhibit, and
17 there was the question, Well, now look at this. And
18 he had marked through the application number and
19 written in the patent number. And I'm not sure what
20 came of all of that.

21 MR. ROBERTSON: We'll go back and check, Your
22 Honor.

23 THE COURT: All right. But if you're going
24 to argue that, you look at what I ruled and whether it
25 came in. I think I precluded him from testifying

1 about it.

2 MR. McDONALD: We don't think it should be at
3 issue, and we'll stir clear of it. I understand your
4 ruling and we'll argue it consistent with that and any
5 instruction we think would be prejudicial, especially
6 in view of what's going on with the reexaminations in
7 the case.

8 THE COURT: Is there any issue that you think
9 isn't impacted by the reexaminations?

10 MR. McDONALD: Those reexams are looking
11 pretty good right now.

12 THE COURT: I'm sure they are. See what
13 happens when you kind of zing those little zingers in?
14 It doesn't have anything to do with what I'm doing on
15 a particular issue.

16 Do you have some issue that I need to
17 actually confront with respect to the reexaminations
18 that, in fact, I haven't already ruled on?

19 MR. McDONALD: No. The issue is whether they
20 are going to be able to argue it in closing arguments
21 that the Patent Office did consider the '989 patent,
22 and I'm saying that on specific issue I think you're
23 saying we shouldn't be talking about it anyway.

24 Maybe I'm kicking a sleeping dog here. I'm
25 not sure, but I think if you allowed them to go there,

1 and I can't talk about it, but they can go there on
2 that, that's going to be prejudicial to me anyway, but
3 it's going to be especially prejudicial and unfair in
4 view of what's going on in the reexams.

5 MR. ROBERTSON: The reexams aren't in
6 evidence. The patent is in evidence. And Your Honor
7 made a ruling of law that said consistent with all
8 those other cases and the MPEP, that it must be
9 considered by the examiner.

10 THE COURT: No, that it's there to be
11 considered as prior art by the examiner. There's a
12 big difference. I'm not going to say that the
13 examiner considered it. I don't know whether he did
14 or not.

15 If I were the finder of the fact, I would
16 find from the law that he could consider it, and that,
17 in fact, it was considered. But my question is: How
18 does that issue come up with respect to what they have
19 to decide? Is there an issue that they actually have
20 to decide with respect to what was considered by the
21 Patent Office now?

22 MR. McDONALD: The context, I guess, really
23 is the burden we have is clear and convincing evidence
24 either way, and some people might say that shifts
25 because if you assume that the examiner saw the prior,

1 art, that might make the burden higher or lower.
2 That's one of these patent lawyer debates on the head
3 of a pin.

4 THE COURT: I agree it's how many angels can
5 stand on a head of a pin, and I never have been good
6 about deciding that issue.

7 All right. Now, so there are no other
8 instructions at this time. Are you going to get those
9 over to me first thing in the morning?

10 MS. STOLL-DeBELL: Email them?

11 THE COURT: You can email them to
12 Ms. Haggard. She will get them taken care of for me.

13 MR. ROBERTSON: Your Honor, we did have that
14 curative instruction with respect to Dr. Shamos' slide
15 that had the Court's claim constructions in it. I
16 proposed that if the defendant was not going to use
17 those in closing arguments, then we don't need a
18 curative instruction, but I don't think we resolved
19 that.

20 MR. McDONALD: I asked for a copy of what
21 slides they were talking about.

22 THE COURT: That was the last topic I
23 heard -- discussion I heard on the topic was Mr.
24 McDonald requested what is it you're talking about,
25 and I think that's a reasonable thing.

1 Also for purposes of review, and because there's been some
2 confusion in this case with respect to a lot of evidence that
3 has come in with respect to, say, PO Writer and J-CON, and what
4 we don't want to have is a situation where the jury comes back
5 and says, well, PO Writer or J-CON invalidated.

6 You know there's a question from one of the jurors
7 which we still haven't resolved, so there is some apparent
8 confusion about that. So for purposes of review, for example,
9 if they were to come back and say J-CON invalidates claim three
10 of the '683 patent, it could go back with an explanation that
11 you can't consider J-CON for that, and we could clear up that
12 confusion. Otherwise, it's simply a black box. We have no way
13 to understand --

14 THE COURT: If you do that, don't -- I understand
15 your point, but if you do that, you then have to have separate
16 inquiries, one invalid for anticipation and the other invalid
17 for obviousness, because you are using different prior arts for
18 each, as I understand it, from what Ms. Stoll-DeBell said, and
19 I don't think you can actually -- if you're going to have a
20 more detailed specific finding on a verdict form as in the
21 special interrogatory, for example, which is sort of what you
22 are talking about here, then you need to make sure it conforms
23 to the evidence in the case.

24 MR. ROBERTSON: Well, there will be instructions,
25 Your Honor, as to which references can be considered for

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC. : Civil Action No.
vs. : 3:09CV620
LAWSON SOFTWARE, INC. : January 24, 2011

COMPLETE TRANSCRIPT OF THE JURY TRIAL
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE, AND A JURY

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1 ProcureNet, and my client, ePlus, acquired ProcureNet back in
2 2001 with all of its assets, all of its products, and it's
3 patents.

4 If we could have the first slide. It's not on my
5 screen. Is it on anybody else's screen?

6 THE COURT: His screen doesn't work.

7 MR. ROBERTSON: It's always something. Everybody has
8 it? All right. So ePlus acquired these patents, and they've
9 been proven to be very valuable. We've had five of ePlus's
10 competitors that have now taken license to the patents-in-suit,
11 and ePlus has earned almost \$60 million in royalties.

12 ePlus and its customers have received awards for
13 these products as you heard from Mr. Farber for the patented
14 technology. It was a long-felt need in this industry, and
15 there was, as I say, even initial skepticism from Fisher
16 Scientific's own management.

17 Notwithstanding that five of our competitors have
18 taken licenses, Lawson, however, now wants you to let them
19 skate free. Lawson now argues the invention was obvious.
20 That's an argument that can only be made 20 years after the
21 fact with 20/20 hindsight.

22 Lawson suggests that sitting here now, it should have
23 been obvious to create an invention that several engineers
24 spent millions of dollars and more than a year, two years to
25 create and that the Patent Office got it wrong, not once, not

1 RIMS and TV/2 both out there. Both going together.
2 Now, we showed you a little bit of additional prior
3 art as well to give you the context for the
4 marketplace and show that the needs in the market for
5 these types of products for purchasing and requisition
6 systems were already being met by some pretty old
7 systems. That was those P.O. Writer and J-CON
8 systems. And heard some testimony about both of those
9 things.

10 If we could go to the next slide, please.
11 This was one of Mr. Shamos' slides talking about that
12 P.O. Writer system. That was Ms. McEneny who
13 testified what you saw in the video. She talked about
14 the P.O. Writer system. And Mr. Shamos gave some
15 examples of the features of this thing. It was a
16 requisition and purchasing system that even allowed a
17 user to specify a catalog for searching. And then
18 once you've picked a catalog like Bayless that's shown
19 in this page, then you could pick a particular part or
20 look for a part within that specific Bayless catalog.

21 So selecting catalogs to search, selecting
22 parts of the database to search, and then searching
23 them in a two-step process.

24 And if we go to the next slide. Another one
25 of Mr. Shamos' slides here just to give an example of

1 how this P.O. Writer documentation described that a
2 user could create a requisition. Pick the part. Now,
3 I put it on that requisition list.

4 THE COURT: Why are we talking about P.O.
5 Writer? Instruction 29 and 30A don't have that in
6 there at all.

7 MR. McDONALD: This was to show the needs of
8 the marketplace were being met and goes to the
9 obviousness issue.

10 THE COURT: It does not go as prior art, and
11 you're arguing it as prior art, and it's inconsistent
12 with what you said you want as prior art. You can't
13 have that argument. That's not right.

14 We've gone beyond that in this case. Excuse
15 me. Disregard that about the P.O. Writer.

16 MR. McDONALD: All right. Can we go back to
17 slide 43. So these were the key parts of the IBM
18 literature that really show it's obvious to combine
19 this with RIMS. So we've got all these features from
20 the RIMS system. We've got all these features from
21 the TV/2 system. Together they have all the elements
22 of the claims here. So now the question is, is it
23 obvious to combine them? The Judge will give you an
24 instruction on that, but that's the question for one
25 of ordinary skill in the art at the time August of '94

1 recollection, isn't an uncommon experience. And so in weighing
2 the effect of some discrepancy, always consider, does that
3 discrepancy pertain to a matter of importance or to some
4 unimportant detail? And does that discrepancy result from
5 innocent error or from deliberate falsehood?

6 After making your own judgment, you're going to give
7 the testimony of each witness such credibility, if any, as you
8 may think it deserves. That is up to you to do.

9 Something came up during the trial that I need to
10 sort out for you. Several days ago, Mr. Christopherson
11 testified, and there was some testimony about whether Lawson
12 obtained an opinion of counsel of non-infringement or
13 invalidity on the patents. I instruct you now that I have
14 excluded that testimony. That issue is simply not pertinent to
15 the case. It has nothing to do with the case, and I'm
16 instructing you to disregard whatever was said about the
17 intention or nonintention of counsel by Lawson.

18 Now, several times during the trial, the lawyers have
19 pulled out depositions and have asked a witness a question and
20 said, on such and such a date, didn't you say this after the
21 witness has said something here in court.

22 A deposition is a sworn statement made out of court
23 but under oath, but the testimony of a witness can be
24 discredited or impeached by showing that a witness made
25 statements earlier which are different or are inconsistent with

1 contends they are obvious by prior art references.

2 The following things can be prior art:

3 (1) Any product or method that was publicly
4 known or used by others in the United States before
5 the patented invention was made;

6 (2) publications having a date more than one
7 year before the filing date of the patent;

8 (3) any product or method that was in public
9 use or on sale in the United States more than one year
10 before the patent was filed;

11 (4) any patent granted on an application for
12 patent by another person filed in the United States
13 before the invention by the applicant for the patent.

14 Lawson contends that the following, each one
15 of them, are prior art that anticipates. Now, there's
16 a difference between their contention of what is prior
17 art that anticipates the patent and what is prior art
18 that makes the patent obvious. And this is the prior
19 art for purposes of anticipation. And that is what
20 they call the Fisher RIMS system and also U.S. Patent
21 number, what's been called the '989 patent.

22 EPlus disputes that any of those are prior
23 art or that any of these anticipate the asserted
24 claims. It is up to you to decide what is or isn't
25 prior art in accord with instructions that I give you.

3301

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC.,
Plaintiff,
v.
LAWSON SOFTWARE, INC.,
Defendant.

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Civil Action
No. 3:09CV620
January 25, 2011

COMPLETE TRANSCRIPT OF **JURY TRIAL**
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE, AND A JURY

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OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

1 THE COURT: All right. In Section II,
2 validity, (A) what are we supposed to use to define
3 "Fisher RIMS" in A?

4 Next question: Since J-CON and P.O. Writer
5 aren't listed on our verdict sheet, are we to consider
6 them as prior art? Isn't that what they were included
7 in the case for?

8 Next question: Was P.O. Writer meant to be
9 considered as a competing, similar system or was that
10 evidence not to be included in deliberations?

11 Next question: In jury instruction, Judge
12 Payne spoke of anticipation. Two items combined are
13 not prior art. So anticipation does not apply
14 anymore; is that correct?

15 Let's take the easy ones first at the back.
16 I propose to call them back in here and refer them to
17 the anticipation instructions and to remind them that
18 you can't combine two pieces of prior art for purposes
19 of anticipation, that it all has to be -- that you
20 have to consider whether there's anything in one
21 single prior reference, prior art reference. And
22 anticipation is in the case but not in terms of the
23 combination, that the combination applies only to the
24 obviousness; is that right?

25 MR. ROBERTSON: I think, Your Honor, there

1 claim by claim basis.

2 It is for you to decide whether Lawson has
3 met its burden by clear and convincing evidence. In
4 other words, you decide whether Lawson has proved what
5 I outlined for you. Does that help you?

6 THE JURY: Yes.

7 THE COURT: Okay.

8 The next question is: Since J-CON and P.O.
9 Writer aren't listed on our verdict sheet, are we to
10 consider them as prior art? Isn't that what they were
11 included in the case for? Was P.O. Writer meant to be
12 considered as a competing, similar system or was that
13 evidence not to be included in deliberations?

14 There really are two parts of that, and for
15 that I would like to refer you to instruction 30,
16 which lists prior art for purposes of anticipation,
17 and to instruction 39, which lists the prior art
18 that's at issue for obviousness.

19 You will note that neither J-CON or P.O.
20 Writer is listed as prior art either for purposes of
21 anticipation or for purposes of obviousness. That
22 means that you cannot consider either P.O. Writer or
23 J-CON or the combination thereof for purposes of
24 deciding anticipation or obviousness.

25 Are you with me so far?

1 THE JURY: Yes.

2 THE COURT: Now, you asked is that evidence
3 in the case still? That is, that there existed
4 something called J-CON and P.O. Writer. And the
5 answer to that is I refer you to instruction 42. 42,
6 I told you, has certain factors which, if established,
7 may indicate that the invention would not have been
8 obvious. In other words, these are things that show
9 non-obviousness. None of those factors alone is
10 dispositive and you must consider the obviousness or
11 non-obviousness of this invention as a whole.

12 But if you'll look at No. 2 in that list,
13 there are six things or seven things, I think, in that
14 list. Yes. No. 2 says, Was there a long felt but
15 unresolved need for a solution to the problem facing
16 the inventors? The inventors meaning of the '683, the
17 '516, and the '172 patents, which was satisfied by the
18 claimed invention. And the evidence about that there
19 is a J-CON and there is a P.O. Writer was admitted for
20 you to consider in deciding whether or not you think
21 there was a long felt but unresolved need for a
22 solution to the problem facing the inventors in this
23 case, which was satisfied by the claimed invention.
24 In other words, that evidence is related and admitted
25 only for the purpose for you to consider in deciding